JULIE GUTMAN DICKINSON
HECTOR DE HARO
BUSH GOTTLIEB, A Law Corporation
801 North Brand Boulevard, Suite 950
Glendale, California 91203
Telephone: (818) 973-3200
Facsimile: (818) 973-3201
jgutmandickinson@bushgottlieb.com
hdeharo@bushgottlieb.com

Attorneys for International Brotherhood of Teamsters

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

INTERMODAL BRIDGE TRANSPORT, Employer and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party	**Case Nos. 21-CA-157647** **21-CA-177303**

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Supreme Court Cases

Other Federal Cases

National Labor Relations Board Cases

State Cases

Statutes and Regulations

Other Authorities

I. Statement of the Case

On November 28, 2017, Administrative Law Judge Dickie Montemayor ("ALJ" or "Judge Montemayor") found that Intermodal Bridge Transport ("IBT" or "Respondent") violated the National Labor Relations Act (the "Act") by: misclassifying its drivers as independent contractors (an independent violation of Section 8(a)(1) of the Act); coercively interrogating and polling employees regarding their support for the International Brotherhood of Teamsters (the "Union"); promising an employee better work for abandoning his union support; threatening drivers with unspecified reprisals and suggesting that they leave the Company rather than engage in protected concerted activity; expressing to employees that a union organizing campaign would be futile; and threatening employees with plant closure for supporting the Union.[1]

On March 2, 2018, Respondent filed exceptions to the ALJ's finding that IBT violated the Act. As set forth herein, Respondent misstates the evidence in this case. Judge Montemayor correctly considered the entirety of the record, made credibility determinations as necessary based on his observations, and correctly applied Board law to the facts. Charging Party therefore respectfully urges the Board to affirm the ALJ's findings that IBT violated the Act as stated above and as described in Charging Party's separate cross-exceptions filed on March 16, 2018.

II. Introduction and Background Facts

Since 2008, IBT has deprived its drivers of their Section 7 rights by misclassifying them as independent contractors and forcing them to sign independent contractor agreements while, in actuality, maintaining an employee-employer relationship with them. When drivers began to engage in protected concerted activity in 2014, IBT attempted to continue the coercive misclassification by engaging in a "pattern of attempting to manufacture a record that would color the facts in its favor."

[1] Citations to "ALJD" refer to Judge Montemayor's Decision in this case. Citations to "Tr." refer to the transcript in this case. Exhibits in this case will be cited as follows: Joint as "Jt. Exh.", General Counsel as "GC Exh.", Respondent as "R. Exh.", and Union as "U. Exh." Citations to Respondent's brief will be "Resp. Brf."

(ALJD 10). IBT also began committing a litany of unfair labor practices ("ULPs") to nip this protected activity in the bud: from coercively interrogating, to threatening plant closure, to making other unspecified threats for engaging in protected activity.

Although this case includes the finding that misclassification in and of itself violates Section 8(a)(1) of the Act because it is inherently coercive, the remainder of the case is a standard example of an employer profiting by misclassifying its employees and then taking any steps necessary to prevent its workforce from unionizing.[2] Under any formulation of the Board's employee status test, these long-term drivers are indisputably employees who work at the very core of IBT's business, are controlled by IBT to the extent necessary for IBT to operate its business, and who do not have any real opportunity for entrepreneurial loss or gain.

Respondent attempts various methods of escaping this basic reality—making unavailing claims about the statute of limitations, urging the Board to undo decades of Board and Supreme Court precedent regarding the proper burden for excluding individuals from the protection of the Act, exaggerating and misstating the evidence presented at hearing, and focusing on the non-credible testimony of one driver whose testimony contradicted the testimony of all other drivers and Employer witnesses. A fair review of the record, however, demonstrates that Respondent's arguments fail. The Board should reject Respondent's exceptions in their entirety.

A. IBT's Operations

IBT has been operating out of Wilmington, CA as a motor carrier providing drayage services out of the Ports of Los Angeles and Long Beach for its customers since 1998. (Tr. 2117-21; 3907-12; 2041). IBT has its own operating authority from the Department of Transportation and from the State of California. (Tr. 3841-42). IBT also entered into concession agreements allowing it

[2] Because the non-misclassification ULPs are so straightforward, Charging Party will not address them in this brief, but adopts the General Counsel's argument and position.

and its drivers access to the Ports. (Tr. 3873; 3849-50). There is no evidence that any of IBT's drivers have their own operating authority or concession agreement. IBT Wilmington runs its own day-to-day operations and IBT Corporate drafts the various agreements and paperwork that IBT requires from its drivers. (*see* Tr. 1692-93; 1716-18; 1758-64; 3857-59).

When it first began operations in 1998, IBT did not own any trucks and only worked with individuals who owned their own trucks. (Tr. 3010-11, 3919-20). This continued until the Ports instituted the Clean Truck Program in 2008. (Tr. 3929-30). Under this program, only newer "clean" trucks would be allowed in the Port. (Tr. 63-64, 1685-87, 2074-77). When this program was instituted, IBT had about 100 drivers, most of whom did not have the wherewithal to obtain new "clean" trucks. (Tr. 63:2-64:5; 2076-77; 4126-27; 3929-30). IBT made the business decision to obtain 50 trucks itself, using incentives provided by the Port. IBT decided it would be advantageous to retain its current truck owners as drivers for these new trucks. Rather than hire the drivers directly, however, IBT decided to contract with a staffing agency named Staffmark. (Tr. 1685-88). IBT told drivers that in order to keep working at IBT they would have to apply through the staffing agency. (Tr. 1303; 3929). Between 30 and 50 of IBT's drivers did so initially, continuing to work at IBT through Staffmark. This number grew as IBT got its new trucks on the road and obtained more drivers through Staffmark. (Tr. 1667-68; 3939-32).

Although the drivers were employed at IBT through Staffmark, most of their interaction was with IBT—they showed up at the IBT yard to be dispatched by IBT dispatchers, and sometimes received choices of assignments when dispatched. (Tr. 3098; 3117-18; 3743; 3935-36). They drove the trucks leased by IBT—without having to pay for them—to deliver for IBT's customers (Tr. 113-14; 631). And they turned in their manifests and daily logs directly to IBT. (Tr. 1687-88). IBT operated under this business model until about 2010, when IBT decided it was too expensive to continue employing drivers through Staffmark. (Tr. 2079-80; 3936).

Instead of contracting with individuals who owned trucks or arranging long-term lease-to-buy arrangements with drivers, IBT Wilmington and IBT Corporate made the business decision to onboard drivers directly and begin to charge them a daily fee for using the trucks they were already using while employed through Staffmark. (Tr. 2081-83, 3936-37). IBT Corporate determined how much it was paying for the trucks, and set the daily "lease" rate for drivers at that amount. (Tr. 2106-08). IBT also passed through other operating expenses—such as fuel expenses and paying for citations—to the drivers. (Tr. 406-07; 656-60; 1877-79; 3840; 3136-37).

IBT told drivers that they would continue doing the same work that they had been doing through Staffmark, and that they had to onboard directly and begin paying the daily lease payment for the use of the truck if they wanted to continue working. (Tr. 114-15; 631-34; 1304; 3114-15). IBT then began labeling these drivers as "independent contractors" in the take-it-or-leave it agreements it required drivers sign. (*see* GC. Exh. 7). Accordingly, the ALJ correctly found that "Even though Staffmark was no longer used to supply IBT drivers, the work drivers performed did not substantially change. In fact, the driving that was done by the drivers as Staffmark employees was identical to the work performed by drivers under IBT's new model." (ALJD 4).

IBT employs its drivers to move its customers' loaded and empty containers in and out of the ports within an approximately 60 mile radius. (Tr. 2609, 2611-19; R. Exh. 45). IBT is responsible for the 700 to 800 loads it completes every week for its customers from the moment the cargo leaves the Port until the empty container returns to the Port (Tr. 2155-56; 2628-29; 2623-25). Loaded containers must be removed from the Port and empty containers must be returned to the Port in order to avoid fines against IBT's customers or, in some instances, IBT itself. IBT tracks the timelines on all its containers to avoid these fines. (Tr. 3920-26). IBT is responsible for returning empties to the Port because its customers pay one flat fee that includes both delivery of the goods and return of the empty container to the Ports. (Tr. 3924-27).

IBT management is responsible for obtaining and managing IBT's customers. Drivers do not work with specific customers exclusively, do not find new customers for IBT, and do not make suggestions regarding the servicing of those customers (Tr. 161-64; 663-64; 932-33; 1090-91; 1388-89). Drivers also do not negotiate customer rates—this is done by IBT management. (Tr. 2121-23; 2460-61; 3997-98).

In agreements with its customers, IBT agrees to provide drayage services as an independent contractor and represents that it provides service as a motor carrier. (see e.g., U. Exh.46 at IBT060115; Gc. Exh. 104 at IBT060087; U. Exh. 47 at IBT060134; GC Exh. 104 at IBT060086). IBT is required to inform customers when it subcontracts their work, and at least one agreement requires that any subcontractors have their own operating authority. (Tr. 3990-92; U. Ex. 42 at IBT060115). There is no evidence that IBT ever informed any customer that it was subcontracting work to its alleged independent contractor drivers. IBT's drivers do not and cannot subcontract any work they receive from IBT's dispatchers. (Tr. 1730).

B. IBT's Drivers

At the time of hearing, 77 of IBT's 95 total drivers were under this "lease" arrangement where they use IBT's trucks and pay for the usage of the trucks on a daily basis. (Tr. 3859-60).[3] Half of these drivers have been with IBT since at least 2010 when the current business model began, and 85% have been at IBT since *before* 2014. (*see* GC Exh. 54; Tr. 1695-98, 1962-69, 3786-87, 3859-60). Many of the drivers who have worked for IBT since 2010 also worked for IBT under

[3] As noted by Judge Montemayor and extensively discussed during the hearing, this case *only* involves the drivers who are subject to this lease or rental arrangement with IBT—not drivers who obtain their trucks from other sources. (Tr. 2570-75; 2783; 2802; 2990; 3020-29; ALJD 4 ("The drivers who lease their trucks are the subject of this litigation while the drivers who own their trucks are not.")). Truck ownership, however, is not dispositive in the employee status analysis and the Board has regularly found owner-operators to be employees. *see R.W. Bozel Transfer, Inc.*, 304 NLRB 200, 200-01 (1991) (finding that owner-operators are employees and that "the Regional Director erred . . . by according too much weight to the fact that he owner-operators own their own trucks."); *Corp. Express Delivery Sys.*, 332 NLRB 1522 (2000); *Cmty. Bus Lines*, 341 NLRB 474 (2004); *Slay Transp. Co.*, 331 NLRB 1292 (2000). The Union maintains that if the issue came before an ALJ or the Board, the truck owners working for IBT would also be found to be employees.

Staffmark and, as noted by the ALJ, "the work drivers performed [before and after this transition away from Staffmark] did not substantially change." (ALJD 4).

The drivers who testified have not worked at any other trucking company in the years they have been at IBT, and no driver testified about ever using the truck they lease from IBT to work for any person or entity other than IBT (Tr. 285-86,[4] 512-13, 630-31, 697-98, 1134-35, 1445-48, 1609, 2874-75, 2974, 3076, 3096, 3262-64; 3255). No driver has ever hired someone else to work at IBT on his behalf or leased two trucks at once.[5] Since IBT began its current model, no driver has ever used an insurance policy other than the insurance provided by IBT (Tr. 1845-46; 2682).[6] Drivers do not have registered trucking businesses, are not registered as motor carriers, do not carry business cards, and do not advertise their services as drayage providers. (Tr. 196-97, 697-98, 962-64, 1134-35, 1445-48, 2976, 1388-90). Drivers do not interact with IBT's customers except to drop off a container—do not make suggestions on service, do not solicit new customers, and do not negotiate rates (Tr. 663-64, 932-33, 1090-91, 2933, 2976, 3094).

Drivers apply and interview for work at the IBT facility. (Tr. 1702-04; 3806-07). Until mid-2014, IBT had drivers fill out a "Driver's Application for Employment" when applying. (Tr. 1712-13; 3787; GC Exh. 19, 50). IBT made changes to this form in 2014 by removing the "Employment" reference and calling it an "Independent Contractor Application." (see e.g. GC Exh. 41). IBT then had its current drivers fill out and *backdate* this new document. (Tr. 125-26; 543; 562; 634-39; 758; 900-03; 1060-64; 1309-10; 1361-66; 1583-90; GC Exh. 8, 41, 38, 30, 25; 59; 60; 51). IBT admits it

[4] Osoy left IBT for two days when they would not place him on the day shift and worked elsewhere, but returned to IBT when they agreed to do so.

[5] Drivers have been instructed to check "No" on the weekly lease where it asks whether they will hire anyone (Tr. 406; 1371-76; 1069-70; 1317-18). Drivers do not believe they are allowed to hire others (*See e.g.* Tr. 498-99, 948, 1106). No driver has ever checked "yes" on the weekly lease agreement to indicate they will hire someone else. (Tr. 1784-85; 3464-71; 3433-35). Bradley suggested that the only way a driver would be able to hire someone else is if the driver leased two trucks—and no driver has ever leased two trucks from IBT at the same time. (Tr. 1784-85).

[6] Drivers were told they could not obtain their own insurance (Tr. 1427-49; 1358; 1159-61; 1328-29; 2939-40). IBT Corporate obtains the insurance: drivers play no role in it. (Tr. 1841-44; 1875-76)

had drivers backdate the form, that it destroyed the original applications, and that there was no change in business model necessitating a change in the application. (Tr. 1716-22, 24-27, 1746).

IBT does not require any specialized training from drivers. (Tr. 196; 445; 900; 1305; 1586). When IBT hires a driver with less than one-year experience, IBT itself trains, tests, and certifies that the driver has completed an Entry-Level Driver Awareness course. (Tr. 1971-73; U. Exh. 20, 21). IBT itself also provides a hazmat test and training to drivers certified to transport hazardous materials. (Tr. 1708; 1980-84; 3838-40; 1708-11; U. Exh. 24).[7] At one point, Director Brent Bradley ("Bradley") certified on a "Record of Road Test" document for all IBT drivers that he had completed a 14 mile driving test to observe and rate over 100 separate skills. (U. Exh. 22).[8]

III. Argument

A. The Board Should Discount Both Testimonial and Documentary Evidence Presented by Respondent Because It is Inherently Not Credible

Much of Judge Montemayor's decision rests on his credibility determinations based on his observation of the witnesses at the hearing, determinations which allowed him to sort through sometimes contradictory testimony regarding both the alleged violations in the consolidated complaint and the working relationship between IBT and its drivers. The Board should affirm the ALJ's credibility determinations and finding that IBT engaged in a "pattern of attempting to manufacture a record that would color the facts in its favor." (ALJD 10). This dishonest conduct by IBT renders unreliable both the testimony provided by Employer witnesses and any documentary evidence presented by the Employer. Mindful that IBT proved capable of engaging in the deceitful conduct revealed at the hearing, IBT was also capable of manufacturing testimonial or documentary

[7] Although Federal Law requires drivers complete these trainings in some circumstances, nowhere in statute or regulations is IBT required to provide or make available that training itself.

[8] On the stand, Bradley claimed he never did these tests, basically representing that he falsified and backdated the forms. (Tr. 1974-79; 3782-83).

evidence that might not have been as easily uncovered. The Board should give IBT's evidence little to no weight when contradicted by the General Counsel's ("GC") or the Union's evidence.

1. Evidence Presented by IBT is Unreliable and Manufactured

The most egregious of the dishonest actions identified by the ALJ involved IBT redrafting federally required forms to remove references to "employment" to align them with the argument that its drivers were independent contractors, then instructing drivers to backdate these forms while destroying the originals that referenced "employment."[9] The ALJ found not only that IBT's managers intentionally engaged in this conduct, but that IBT's witnesses were misleading or untruthful about these actions while under oath. Specifically, the ALJ found that Bradley's explanation that the backdating charade was just a miscommunication was not credible—instead, the ALJ found that IBT engaged in "an affirmative attempt to conceal the original . . . and color the record." (ALJD 10). If IBT's witnesses were willing to be less than honest about this fact, it is likely that they were less than truthful about other issues.

The ALJ then provides a few other examples of IBT's "affirmative attempt to color the record" (while making it clear that this list is not exhaustive). These include IBT manufacturing forms that lie about translating documents into Spanish and manufacturing "sham" negotiations meant to "make it appear that drivers had some ability to negotiate rates when in reality they did not." (ALJD 10; U. Exh. 66, 67). Other examples of IBT's dishonesty are readily available in the record. During the hearing itself, as remarked on by the ALJ, IBT introduced and relied on documents that it had not but should have produced in response to the GC's or Union's subpoena. (Tr. 431-32 ("I think is [sic] important is that, you know, what happened today is that you had documents that they didn't have. And witness [sic] were looking at documents that they didn't have,

[9] IBT's ability to force its entire driver workforce to backdate these forms, some under protest, is an undeniable indicator of an employee-employer relationship—why would a true independent contractor ever take such action?

when it was pretty clear you had them," 372-73, 391-93). Bradley himself also admitted to falsifying and backdating the Record of Road Test he filled out for some drivers. (Tr. 1976-78). On the stand, IBT witnesses had to backtrack and change their testimony when confronted with documentary evidence—such as when Bradley initially denied giving tests to drivers, (Tr. 1970-71], and Zea initially denied telling his dispatchers to force drivers not to leave containers in the yard. (Tr. 2416-17). Operations Coordinator Marlo Quevedo ("Quevedo") similarly denied talking to drivers about the Union or the Teamsters, then admitted that he was able to identify which drivers supported the Union because drivers spoke to him at the dispatch window about whether or not they supported the Union. [*compare* Tr. 3737:4-11 *with* Tr. 3766-67). The Board should affirm these credibility determinations made by the ALJ and should discredit Respondent's so-called evidence.

It is also worth noting that much of Respondent's exceptions arguments are based on the inherently problematic testimony of one of its driver witnesses, David Cabral ("Cabral"). On the stand, Cabral appeared to be speaking of a completely different company than any other witness (including those put on by the Employer). Cabral testified that he obtains assignments from dispatchers through email and that he takes his keys and radio on his own before dispatch begins. (Tr. 3166-67, 3188-89). Dispatchers, on the other hand, testified that drivers *do not* communicate with them through email and that dispatchers hand out keys and radios—Quevedo specifically denied that day shift drivers take radios before dispatch begins. (Tr. 3524, 3527, 3528, 3328-29, 3382). Cabral is also the only driver to mention checking the Pier Trucker website. (Tr. 3030-31). Only Cabral testified he consistently keeps his truck out longer than 11 hours without being charged—in direct contradiction of the weekly lease agreement he signs. (Tr. 2416-17; GC 144 at 2 ("If the truck is returned to IBT's facility after the due time the Lessee shall be imposed a late fee of $25 per hour until returned)). He is also the only driver who does not always fill up at the end of his shift because he knows no one is going to use the truck he is using and that he will get that same

truck the following day. (Tr. 3252-54). Cabral was one of only two lease drivers who was chosen to test an experimental hybrid trucks, which would save him money under IBT's system by using 25% less fuel. (Tr. 3169-72; 3227-28][10]. Cabral was the only driver to testify that he works at IBT under a corporate name, Baywater Logistics. (Tr. 3150-51).[11]

These inconsistencies and discrepancies between Cabral's testimony and the testimony of all other witnesses make clear that, as noted by the ALJ, "Cabral was not representative of the other drivers who testified and more of an 'outlier.'" (ALJD 19 fn. 14).[12] The cynical view of these differences in testimony is that Cabral's testimony, like many of the employer's other words and actions, was an "attempt[] to manufacture a record that would color the facts in its favor"—that in some manner, IBT convinced or directed Cabral to testify falsely to benefit IBT. A less cynical view is that Cabral was mostly truthful—an indication that IBT is giving him favorable treatment on the job. Either way, what is clear is that the Board should not give any credence to Cabral's testimony as being representative of the working conditions of any other driver. Thus, because of IBT's patterns of deceit and apparent dishonesty on the stand, the Board should give little to no credence to any testimony from IBT's witnesses when that testimony is contradicted.

2. Agreements Between IBT and Its Drivers are Problematic and Do Not Accurately Reflect the Working Relationship Between the Parties

Even the unilaterally drafted documents that IBT claimed defined its relationship with its drivers were part of IBT's "attempt[s] to manufacture a record that would color the facts in its favor." (ALJD 10). The Board should affirm the ALJ's discrediting of these documents because

[10] Although Cabral states he is not certain who chose him, the only conclusion is that IBT chose him—IBT provided him his other truck, and Cabral would know if he was the one that arranged the trial of the hybrid.

[11] As of April 30, 2017, the California Franchise Tax Board showed that Baywater Logistics was suspended. *See* California Secretary of State Business Search for Baywater Logistics *available at* https://businesssearch.sos.ca.gov/.

[12] Respondent attacks this statement as being unsupported. The ALJ, did, however note that there was no "evidence that any other driver even arguably operated" as Cabral did. (ALJD 19 fn. 14). When coupled with the discrepancies noted above, there is ample support for the ALJ's decision to discredit Cabral as non-representative.

"the language in the documents purporting to represent the independence of the employees did not represent the actual conditions under which the employees worked." (ALJD 10). Therefore, the most reliable evidence is that of the drivers presented by the GC because, "[r]egardless of the paper trail IBT was attempting to manufacture, the basic duties of the drivers remained the same throughout the relevant period in question." (ALJD 10).

Further evidence that the Board should discount all documentary evidence from IBT, particularly the Lease and Transportation Agreement ("LTA") and the Weekly Lease Agreement, which are the two main agreements that purport to describe the relationship between IBT and its divers, arises from the drafting and promulgating of these agreements. Most significantly, IBT's own witnesses either feigned or were actually ignorant of why all these documents were drafted and subsequently amended. Neither Bradley nor Zea knew who drafted the 2010 LTA. (Tr. 1737-38; 2087-89). Zea stated he never read the 2014 LTA and does not know why a new version was needed, (Tr. 2090-92),[13] and Bradley also stated he did not know what changes were made to this LTA. (Tr. 1744-46).[14] Both Bradley and Zea confirm, however, that there were no corresponding change to IBT's operations necessitating new agreements in 2014. (Tr. 1744-46, 2090-92). Bradley also claimed he was unaware that the weekly lease used through at least September 2014[15] included

[13] Zea, the top manager at IBT Wilmington, also claimed that he had never seen two new forms that had been drafted by IBT and included in the on-boarding process since 2015. (Tr. 2092-96; GC Exh. 66, 67).

[14] Although largely similar, the 2014 version did contain some changes. For example, the 2010 version contained a clause limiting drivers to only operating under the terms of this agreement while in the United States. (see GC Exh. 7, 65 at 7). The 2014 version of the LT Agreement removed this clause.

[15] Although this language appears to have been removed from the main Weekly Lease Agreement that drivers now sign, it is difficult to tell because IBT only provides the first and last page to drivers (and at some points only a single page), and there are often discrepancies even between these two pages that make it difficult to tell which version is being used. (Tr. 136; 645; 1072; 1371-76). Even Bradley could not affirm that these middle pages always remained the same, (Tr. 1782-83; 3427-30), and examples from the same week show the same front and back pages with different middle pages inserted inside. (compare GC Exh. 22, 42; 53). Despite this language allegedly being removed, the sample shown to drivers continues to contain the minimum rental commitment (R. Exh. 64) and the current version of the agreement includes a reference to the now non-existing Minimum rental commitment (GC Exh. 22 ("Lessee will not be charged for the days the truck is out of service and each day out of service will count towards the Minimum Rental Commitment.")).

a "minimum rental commitment" whereby drivers committed to paying for the truck rental for four days whether or not they worked four days, and then testified that Zea had unilaterally decided to "opt-out" of this provision—a surprising admission considering that IBT alleges this is a legally binding contract on both parties. (GC Exh. 68, 69; Tr. 1768-73).

Drivers were not allowed to make changes to or negotiate the terms of these agreements, drivers did not receive these agreements in Spanish, and drivers testified they were not even able to take these agreements home to review before signing. (Tr. 116-19, 1166, 1369-79, 1068, 639-43, 761-65, 904-07, 995, 1066-69, 457-59, 509-10, 647, 913, 955, 1073, 1320, 1371-76, 1381, 1632, 3080-81). Most drivers received and signed the 2014 LTA on the exact same day, when they were picking up their checks. (Tr. 130, 646, 1748). Some drivers testified that they had to sign on the spot to get their paycheck, and other drivers were told that they had to sign the agreements in order to continue working. (Tr. 1497-1500, 1319-20, 1235, 1500-01, 567, 1371-76, 2105-06, 3105-06, 404-06, 1595-1601, 459-60, 1059, 1595-1601, 1069-73, 765-67). Even Rosas, who has gotten drivers to sign the LTA since 2015, admitted on the stand that she had not read the LTA herself—she merely had a dummy copy that she used to tell drivers where to sign and initial and fill in blanks while flipping through the agreement. (Tr. 1232, 3471-74, 3835-38, 2429-43, 3441, 3473-75).

This in no sense resembles an arms-length negotiation between two truly independent parties regarding the terms that would govern their relationship. If it were, both parties would have received the agreement in their preferred language, the parties would be intimately aware of the terms of these agreements, and there would have been at least some level of back and forth on the terms of these agreements.[16] Instead, these facts are more reminiscent of the scenario in *Borden Co.*,

[16] Respondent spends much of its brief challenging drivers' asserted proficiency in English and asserting that drivers did understand the terms of these agreements. The challenges to drivers' English comprehension is unavailing—there is a major difference between the level of English skills necessary to perform a job that mainly consists of driving and simple interactions, and the level of English skills necessary to comprehend a legally complex, 26 or 28-page agreement that was drafted by another party. Further, the claim that drivers understood the agreements fall flat when

156 NLRB 1075, 1078 (1966), where "[i]nstead of contract negotiations occurring between the Company and the captain involved and culminating in a mutual understanding and agreement, a company official would call the captains together, advise them of the terms of the agreements, and then ask them for their approval on a take-it-or-leave-it basis" (except that IBT's drivers were not even advised of the terms in the agreements they had to sign). The Board found by "formulating the agreements that purported to define the basic relationship between itself and the captains, [the Employer] exercised the type of control that is generally found to exist between an employer and his employees rather than between a principal and an independent contractor." *Id.* The same can be said here—all that IBT's agreements represent is the fact that IBT has the ability to structure and dictate the terms under which its drivers purportedly work—just like other employers do every day.

Substantively, it appears that no one at IBT—much less the drivers—know what these agreements actually are or why they are required by IBT. Zea, the top manager at IBT Wilmington, could not even describe in plain terms what these agreements entailed. He described the LTA as: drivers "need to sign the lease agreement before they can drive the truck. It's like if you were to rent a car, they won't give you the key or the car until you sign the lease agreement. That's pretty much the way that I see it," while saying that the Weekly Lease Agreement was for if the drivers "want to drive that week." (Tr. 2087-89). This misstated the purported purposes of both these documents—the LTA actually purports to have the *driver* furnish *IBT* with both a truck and the necessary labor to operate that truck. (GC Exh. 7 at 2). This is particularly curious when we consider the fact that the drivers at issue in this case—those who rent or lease their truck on a daily basis from IBT through the Weekly Lease Agreement—do not actually own a truck they can furnish to IBT. Yet,

even three of IBT's top witnesses, Zea, Bradley, and Safety Coordinator Vicky Rosas, had not read or did not understand the agreements themselves.

for some reason, IBT has every single driver sign Appendix A[17] to the LTA even though Appendix A requires the driver to "represent[] and warrant[] that it is the registered owner of the road tractor . . . and in lawful possession of same." (GC Exh. 9 at IBT00863).

IBT attempts to explain this away by claiming that federal law actually *requires* that IBT has its drivers sign this lease agreement. (Resp. Brf. 55, fn. 27). Specifically, IBT points to 49 CFR § 376.12(a) which requires a written lease agreement between a motor carrier and an "owner" of the equipment. (Resp. Excep. Brief at 55 fn. 27). Reliance on this regulation is flawed because, despite IBT's assertion to the contrary, its drivers are not "owners" under the statute. IBT's drivers do not have title in the vehicles that they rent from IBT and they do not have lawful possession of a truck that is registered and licensed in their name.[18] *see* 49 CFR § 376.2(d). The only remaining option is that a driver have "exclusive control of the vehicle." *Id.* In this case, drivers who rent their trucks from IBT in no sense have exclusive control—no driver has ever rented a truck for a full day[24 hours], and the so-called half-day lease [12 hours] explicitly requires that drivers return their truck at a certain time in the day so that other drivers can use the vehicles. Furthermore, it is more likely than not that drivers are going to receive different vehicles when they shows up to work the following day. (Tr. 2103; GC Exh. 16).

Because drivers are not "owners," there is no requirement that they enter into a lease with a motor carrier.[19] In other words, IBT, on its own volition, decided to draft and promulgate these take it or leave it agreements to the drivers to whom it would be renting a truck. This agreement thus

---

[17] *See* GC. Exh. 12, 21, 9, 42, 39, 31, 26, 52.

[18] IBT's trucks are *not* registered in the driver's name. (Tr. 1873-74).

[19] IBT attempts to tie its business model to other trucking companies that institute "leaseback" arrangements with its drivers. This comparison in inapposite, however. IBT's model can more clearly be characterized as a half-day rental whereas other "leaseback" arrangements resemble more typical lease-to-own arrangements whereby a driver takes out a long-term lease on a specific vehicle—in those situations, the drivers arguably do have "exclusive control." An example of this more typical arrangement can be found in the recently decided *Green Fleet* case where—although the Employer otherwise exercised control over the vehicles—the paperwork itself at least purported to constitute a five year lease on a specific vehicle with an option to buy at the end of the five year term.

demonstrates IBT's control over its drivers by unilaterally drafting documents and forcing drivers to sign them in order to work. Furthermore, the troubling inconsistencies in these documents, IBT's unfamiliarity with the documents, and IBT's propensity to attempt to manufacture evidence to color the record indicate that these documents should be given absolutely no weight by the Board (except insofar as they demonstrate IBT's control over its drivers).

B. Drivers are Employees Under the Act

1. Relevant Test is Board's Fed-Ex Decision

The Board's decision in *Fedex Home Delivery* ["*FedEx*"], 361 NLRB No. 55 (Sept. 30, 2014), is the operative employee status test before the Board and is consistent with the Board's previous caselaw, with Supreme Court guidance, and with congressional intent. In particular, the Board's rejection in *FedEx* of the DC Circuit's emphasis on entrepreneurial opportunity was proper because the DC Circuit's formulation of the employee status test tilts directly against Supreme Court guidance stating that all factors must be considered and no one factor is determinative. *See NLRB v. United Ins. Co. of Am.* ["*United Ins.*"], 390 U.S. 254 (1968); *FedEx Home Delivery v. Nat'l Labor Relations Bd.*["*DC FedEx*"], 849 F.3d 1123 (D.C. Cir. 2017). Respondent thus errs in its exceptions brief by relying on the DC Circuit's opinion.

In particular, the main thrust of Respondent's arguments emphasize a notion of a "freedom to operate," calling this a "key ingredient" and advocating for "focusing on this freedom to operate." (Resp. Brf. 22). Through this framing, Respondent buys into the mistaken assumption that either control or entrepreneurial opportunity are the decisive factors in the analysis. The Board has specifically rejected both those formulations, finding that they directly contradict the Supreme Court's ruling in *United Insurance* that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles." *United Ins.*, supra, at 258.

Through this mistaken formulation, Respondent elevates individual components of alleged freedom to operate while ignoring the context in which those alleged freedoms exist.[20] This pitfall is demonstrated, for example, by Respondent's statement: "Granados understands he is currently an independent contractor because if he was an employee he would have to have a specific schedule for arriving and leaving, to get a break, days off, or vacation." (Resp. Brf. 68). Regardless of whether this is Granados' belief, the statement is false insofar as it purports to accurately describe the distinction between an employee and an independent contractor. There are employees across the country who do not have specific schedules for arriving and leaving work. There are undisputed employees who are given some discretion over when to take their breaks or when to take days off, including employers with unlimited vacation policies. In fact, cases that have come before ALJs and the Board specifically recognize that these types of "freedoms" are not determinative when it comes to the question of employee status.[21] A framing of an employer-employee relationship as inherently requiring this type of micromanaging is dishonest, misleads employees, and attempts to have adjudicative bodies ignore larger contexts.

In fact, the employee status analysis is very intricate and fact intensive. Adjudicative bodies must decide "the weight to be given a particular factor or group of factors depend[ing] on the factual circumstances of each case." *FedEx*, supra. at 2. Thus, "the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors." *Roadway Package Sys., Inc.*, 326 NLRB 842, 850 (1998).

Respondent ignores this complexity and attempts to paint employee-employer relationships as inherently devoid of any type of freedom, without considering context and indirect indicia. For

[20] Respondent also misstates the weight of the evidence when describing these alleged freedoms to operate.

[21] *See Sisters Camelot*, 363 NLRB No. 13 (Sept. 25, 2015) (finding employee status for canvassers who chose what days to work); *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011) (finding employee status for musicians who were not required to work continuously).

example, Respondent essentially argues that IBT does not engage in a nebulous concept of "forced dispatch," while ignoring that drivers were subject to repercussions if they rejected loads and that dispatchers still maintain control over what assignments to give drivers, including the discretion over whether to give those drivers choices. IBT argues that drivers can work whenever they want at whatever time they want, ignoring the fact that IBT controls what shift drivers work on and indirectly controls what time they start time by controlling when dispatch begins. Respondent also regularly implies that if its drivers were really employees, they would have to have a completely rigid structure with a specific start time, end time, break time, and vacation time. In doing so, Respondent ignores IBT's indirect control of those aspects of the relationship, and the fact that employers have always had discretion to provide certain leeway and incentives to their employees.

Any rational employer will only exercise the level of control that is necessary for it to accomplish its business goals while being as profitable as possible. If there is no need to micromanage a certain aspect of the relationship, it is actually a detriment to the employer to engage in that micromanaging—why pay to monitor an employee's start time if it makes no difference to your bottom line? Especially when you can otherwise incentivize that employee to operate in your best interest. An employer's ability to forego certain rote indicators of control while otherwise exercising sufficient control to ensure it operates successfully should not insulate an employer from its responsibilities under the Act.

In this case the ALJ considered the greater context and balanced all the factors to correctly find that every single factor weighs in favor of a finding of employee status, including control and entrepreneurial opportunity. The record fully supports the finding that IBT's drivers are employees under the Board's test. As a counterbalance to Respondents mistaken focus on control and entrepreneurial opportunity, we will first analyze factors that—considering the context and

circumstances of this case—merit particular scrutiny by the Board, including analyzing how those factors interrelate with control and entrepreneurial opportunity.

2. Length of Service Overwhelmingly Supports Employee Status

Respondents' contention that "the duration of the relationship therefore supports independent contractor status" is completely without support either in the record or in the relevant caselaw. (Resp. Brf. 56). Quite to the contrary, as the ALJ found, "[i]t is undisputed in the record that many of the drivers have worked for IBT for a substantial period of time on a regular and continuing basis." (ALJD 15). In other words, IBT's drivers are not hired on a short-term assignment by assignment basis—they more closely resemble a traditional, permanent workforce. GC's Exhibit 54 and its relevant testimony demonstrate exactly how long term this relationship is.

As recognized by the ALJ, this document demonstrates that over 80% of IBT's drivers have been working for IBT continuously for four or more years. (*see* GC Exh. 54, Tr. 1695-98; 1962-69). In fact, it appears that approximately 29 drivers worked for IBT prior to 2010, through the Staffmark agency, and then began leasing a truck from IBT when IBT changed its business model. *Id.* Both the Board and the Supreme Court have long recognized that "[t]hese types of 'permanent working arrangements . . . [that] continue as long as their performance is satisfactory' [are] indicative of employee status under the common law agency test." *United Insurance*, 390 US at 259; *Exhibitors Film Delivery*, 247 NLRB 495, 496 (1980).

Respondent provides no actual support for departing from this conclusion. Respondent's only case citation is inapposite because it does not involve the Board's common law test. *Moba v. Total Transp. Servs., Inc.*, 16 F.Supp.3d 1257, 1265 (W.D. Wash. 2014). Further, while both IBT's agreement and the one at issue in *Moba* were terminable upon 24 hours' notice, the agreement in *Moba* was for a fixed term of one year (unless mutually extended), while the IBT agreements "do

not provide a fixed term but rather offer an indefinite duration," (ALJD 15).[22] In addition, the Board has actually found that a relationship which is essentially terminable at-will is an indicator of employee status, *Eureka Newspapers, Inc.*, 154 NLRB 1181, 1185 (1965), particularly where, as is the case with IBT's agreements, there is no penalty on the putative employer for terminating the relationship. *Time Auto Transp.*, Inc., 338 NLRB 626, 637 (2002) (finding drivers to be employees because, in part, "lease agreements are terminable at will by Respondent for any reason without penalty.").

Thus, the length of employment factor strongly supports a finding that IBT's drivers are employees and not independent contractors. Further, because IBT's workforce is long term and stable, this factor becomes even more important and is integral to an analysis of the control factor. As noted above, an employer will only micromanage its employees to the extent necessary to have them perform in the manner the Employer desires. Here, when most of IBT's workforce has been working exclusively for IBT for years, those drivers will have become fully familiar with IBT's rules and requirements to the point where IBT may not need to keep reiterating them.

The reality is that IBT retains and exercises its authority to enforce, instruct, and discipline its driver workforce. (ALJD 12-13). The Board should reject any attempt by IBT to discount discipline, threats of discipline, or still operative work rules/policies which originated before April 2015. (*see e.g.* Resp. Brf. 32 fn 8, 44 fn 19). These instances, discussed further below, are relevant both because a majority of IBT's drivers were able to witness and internalize those actions and because these documents likely pre-date IBT's "attempt[s] to manufacture a record that would color the facts in its favor." (ALJD 10).

[22] The 2014 version of the lease agreement is valid "for one calendar year days [sic] from the date hereof and thereafter continuously unless cancelled by either party." GC Exh. 9.at 14. This is similar to the lease agreement in *Green Fleet Systems*, a case where the ALJ found that a highly similar group of port drayage employee drivers were misclassified as independent contractors. 2015 WL 1619964, Case 21-CA-100003, 2015 L.R.R.M. 180798 (NLRB Div. of Judges, Apr. 9, 2015)., adopted by the Board absent exceptions 2015 NLRB Lexis 505 (Aug 18, 2015).

Accepting such a bright line in this case would be a disservice to the Act and would allow employers to remove long-established employee workforces from the protection of the Act just because those workforces have learned to comply with its employer's rules. If a driver has been at IBT for five years and for the first four years he was given extensive work rules and, and saw IBT enforce those work rules and memos with a progressive discipline system, that worker will assume that those rules and progressive discipline system remain in place until there is an explicit change. In this case, there is no evidence that IBT ever rescinded the plethora of work rules and memos it distributed to employees or that it ever eliminated its progressive discipline policy. Thus, these rules and requirements were an operative part of the working relationship contemplated by drivers and must be considered as continuous elements of control, even if the permanence of IBT's workforce made it unnecessary for IBT to repeatedly pronounce its power.

3. IBT Is in the Same Business as its Drivers, Drivers Perform Work at the Very Core of IBT's Business, and Drivers Are Not Engaged in a Distinct Business or Occupation

The Judge correctly found that these three closely related factors all support a finding of employee status. IBT's claims that its drivers operate in a distinct occupation and that the work done by its drivers "do[es] not constitute the essential services necessary to IBT's completion of its work for customers" is nonsense. (Resp. Ex. Brf. 57). As remarked upon by the ALJ, this "assertion is simply not supported by the overwhelming substance and weight of the evidence of record and needs little analysis." ALJD 16. Despite any claims to the contrary, "[t]he very heart of [IBT's] regular business involves drivers moving containers from one location to another [and] drivers are an integral part of that business." (ALJD 17) (citing *Lancaster Symphony*, 357 NLRB 1761, 1765 (2011)).

In its exceptions brief, Respondent makes various unavailing arguments for why the ALJ was incorrect. First, Respondent points to an Idaho Supreme Court case for the startling proposition

that owner operators are in a different business than motor carriers. *W. Home Transp., Inc. v. Idaho Dep't of Labor*, 318 P.3d 940 (Idaho 2014). To begin, the case is easily distinguishable—it involved a specific question of statutory construction of the definition of "covered employment" under Idaho unemployment law; the case does not even purport to address the common law employee status test. Further, Respondent's citation ignores controlling Board precedent that drivers for companies whose core business is the transportation of goods or people *do not* operate independent businesses and *do* perform work at the core of the company's business. *see Slay Transp. Co., Inc.,* 331 NLRB 1292, 1294 (2000) ("The owner-operators do not operate independent businesses. They use their tractors, on which they are required to display the Employer's logo, to perform work exclusively for the Employer. In so doing, the owner-operators perform functions that are not merely a 'regular' or even an 'essential' part of the Employer's normal operations, but are the very core of its business."); *FedEx*, 361 NLRB No. 55, slip op. at 15 (*citing Community Bus Lines*, 341 NLRB 474, 475 (2004), for proposition that "owner-operators' work is the precise business of the Respondent.").[23]

Respondent alleges that drivers signing bankruptcy documents referring to themselves as "self-employed" truck drivers is proof that those drivers are engaged in a distinct business. This fact is, however, immaterial to the employee status analysis. To start, one of the documents cited by respondent pre-dates that driver's relationship with IBT—Portillo filed bankruptcy documents in May 2008 but did not start driving for Respondent until 2009. R. Exh. 12, Tr. 630. This document is

[23] Respondent also cites the DC Circuit's *FedEx* decision and claims that "the Court rejected the Regional Director's reliance on drivers' performance of the essential business of the company—package delivery—to establish an employment relationship." (Resp. Brf. 57). Not only does Respondent err by citing a decision which has been rejected by the Board, Respondent also misstates the finding in the case—the DC Circuit explicitly recognized that "the essential nature of a worker's role is a legitimate consideration." *DC FedEx*, 563 F.3d at 502. The DC Circuit only cautioned that his factor is not determinative standing alone—a conclusion Charging Party inherently agrees with because no single factor is determinative in this analysis (Respondent would mistakenly argue that both control and entrepreneurial opportunity should be the focus of the analysis). Here, no one is arguing that drivers doing the core of IBT's business is determinative in making the drivers employees—the only argument is that the fact that drivers perform the core of IBT's business *is one of many factors that strongly support a finding of employee status.* This finding is consistent with Board precedent.

thus completely irrelevant.[24] In addition, the selection of the "Truck Driver (Self-Employed)" label within these documents is not relevant because it arises directly from IBT's choice to treat these drivers as independent contractors for tax purposes. The Board has recognized that an employer choosing to provide a 1099 form rather than a W2 form does not convert the employee into an independent contractor when other factors support employee status. *Time Auto Transp.*, 338 NLRB at 639. Judge Montemayor further elaborated as to why the provision of a 1099 form is not determinative: "IBT had full control over the tax documents it provides drivers and because it unilaterally intended to categorize the drivers as independent contractors does not in and of itself conclusively make it so." (ALJD 16).

IBT's unilateral decision to label drivers as independent contractors and provide them with 1099 forms without deducting taxes meant that drivers had to file their year-end taxes as business owners in order to adequately deduct the business expenses IBT's misclassification forced them to assume. Doing otherwise, would have resulted in the drivers being liable for taxes on income they never actually received because it went directly to paying these expenses. Having filed taxes as business owners, it only follows that drivers would have to use the same designation on other official documents—such as bankruptcy petitions. This is not, however, because they considered themselves to be in a separate occupation—it flowed from IBT's self-serving choice to issue 1099s and should therefore not carry any weight in the employee status analysis.

Finally, Respondent makes much of the argument that the Board should not consider the fact that drivers use IBT's DOT and CHP numbers because federal and state law require motor carriers to do so, and that drivers do not perform work at the core of IBT's business because IBT could

[24] It is curious that when it comes to the GC's evidence, Respondent tries to establish a bright line in 2015, before which no evidence is relevant—even if that evidence directly spoke to the relationship between current drivers and IBT. Yet, Respondent has no compunction with citing documents which completely pre-date its relationship with certain drivers when it believes those documents support its case.

always decide to subcontract all the work it gets from its customers. (Resp. Brf. 44-45). This argument ignores, however, the fact that it was IBT's business decisions that led to these results. While motor carriers may have to include their CHP and DOT numbers on vehicles operating under its authority, there is no law requiring IBT to operate as a motor carrier. IBT could have decided to function only as a broker who connects its shipping customers with truly independent motor carriers operating under their own operating authority (either individually or as part of another company). Had IBT done so, drivers would not have been forced to use IBT's DOT or CA numbers. Yet IBT made the conscious business decisions that it did want to be in the business and that it wanted to operate as a motor carrier. Consequently, it is relevant that IBT's business choices led IBT to require that all its drivers use its operating authority and operate under IBT's name, and these facts supports a finding of employee status.

The drivers' use of IBT's CA and DOT numbers on their trucks, along with IBT's logo, is also significant because it demonstrates that IBT's drivers operate as representatives of IBT. In fact, IBT's manual actually describes its drivers as "the company's most visible representatives." (GC. Exh. 71). Further, IBT has completely integrated these drivers into is operations. Lease drivers do not have registered drayage businesses, do not have their own operating authority, do not carry business cards, do not have their own name on the trucks they use, and do not advertise their services as drayage providers**.** They do not drive for any company other than IBT and are dependent on IBT to give them assignments—after each delivery customers must even sign a delivery slip branded with IBT's logo. (R Exh. 58 at C). This strongly supports a finding of employee status because, as in *Roadway*, 326 NLRB at 851, "[D]rivers' connection to and integration in [IBT's] operations is highly visible and well publicized." Similarly, IBT's drivers use IBT's yard, get their work from IBT's dispatchers, rely on IBT's insurance, and use IBT's fuel card to fill up their trucks. Thus, just like *FedEx*, IBT's drivers are "fully integrated into IBT's organization and received

'considerable assistance and guidance from the company and its managerial personnel.'" *FedEx*, 361 NLRB No. 55, slip op. at 13. Without this support, IBT's drivers would similarly "lack the infrastructure and support to operate as separate entities." *Id.* And as in *FedEx*, the "driver's job is to effectuate [IBT's] central mission." *Id.* at 14.

This entire business structure and the integration of its drivers into its operations stems from the fact that IBT made the business decision to obtain 50 trucks for itself and to enter into agreements with its customers where it, and not IBT's individual drivers, took responsibility as a motor carrier for the cargo. Having made these decisions, IBT did not need true owner-operators or other motor carriers to contract with—it just needed employees to provide labor using the vehicles that IBT already had. Although IBT attempted to perpetrate a fiction that these drivers are separate business entities, the reality is that the drivers are completely integrated into and are necessary for IBT's continued operation. Thus, the Board should agree with the ALJ that the following three factors support a finding of employee status: IBT is in the business, drivers do not operate in a distinct occupation, and drivers perform work at the very core of IBT's business.[25]

Furthermore, the structure chosen by IBT comes with a set of controls that is inherently necessary for IBT to comply with its obligations to its customers. Whether directly or indirectly, IBT must (and, as described below, actually does) exercise sufficient control to be able to complete the work it has taken responsibility for. IBT cannot discount the control it exercises under the business model it has chosen merely by saying "I could have chosen a completely different business

[25] IBT's Lease Drivers are almost indistinguishable in this sense from the drayage drivers in *Green Fleet Systems*, 2015 WL 1619964. ("There is no evidence that any of the lease drivers actually incorporated, hired any employees, or performed work for any other company. The lease drivers worked solely for GFS and relied completely on the Company's dispatchers to obtain their assigned work. There is also no evidence that they publicly advertised themselves or operated in any way as a separate business. The Company required all of the trucks, including those operated by the lease drivers, to display both its DOT number (which the carrier is required to display by law) and the GFS logo. Although the Company did not require any of the drivers, company or lease, to wear a uniform or display its logo on their clothing, there is no evidence that any lease driver wore an alternative uniform or displayed his/her own logo. Accordingly, I find that the lease drivers were not engaged in a distinct occupation or business.").

model that would have required me to exercise less control." Otherwise, every employer would be able to make similar claims and unfairly escape obligations under the Act.

Finally, the fact that IBT's drivers do not operate in a distinct occupation and are functionally dependent on IBT to operate also negates any alleged entrepreneurial opportunity that IBT claims its drivers have. It is difficult, if not impossible, to argue that these drivers, whose only asset is their labor, have any true entrepreneurial opportunity. These drivers do not have their own customer base, they do not have established channels to advertise or obtain work, and they do not even have a truck with which to perform this work even if they did find a customer directly. All they can do to increase their earnings is work faster for IBT to complete more loads. This is not true entrepreneurial opportunity.

4. Employer Supplies the Instrumentalities, Tools, and Place of Work

There is no question that this factor supports employee status because IBT provides drivers with "the most critical, important and necessary items to perform the job." (ALJD 15). Respondent errs in its exceptions brief both by focusing on the fiction that drivers pay for expenses, rather than focusing on who is actually supplying the necessary instrumentalities, and by ignoring the fact that the case at hand *only* involves drivers who rent/lease vehicles from IBT on a daily basis.

Along with failing to provide support for the proposition that having your employer deduct its own operating expenses from your paycheck makes this factor support independent contractor status, the entire claim that drivers "pay" for the tools and instrumentalities they use is part of IBT's efforts to manufacture a record supporting its arguments. The truth is that IBT itself supplies and pays for all the major tools and instrumentalities necessary for drivers to complete their jobs, from trucks to the place of work to the paperwork that drivers fill out, and then IBT reimburses itself for

some of those expenses from its drivers earnings[26]—whether this was to increase IBT's profit or merely to disguise the drivers' misclassification, it demonstrates the fiction of claiming that drivers are the ones supplying tools and instrumentalities. In actuality, drivers do not make any investment at all and these tools and instrumentalities are used exclusively for IBT's benefit. Thus, even though IBT is charging drivers , in truth IBT is "hir[ing] the employees to operate his machines in order to accomplish his chosen ends," rather than "leasing out tools so that the 'employees' can pursue their chosen ends." *See Teamsters Local 87*, 273 NLRB 1838, 1842 (1985).[27]

As this case only concerns drivers who obtain their trucks on a daily basis from IBT, there is no question that IBT provides its drivers with the most critical tool for completing their work—the trucks that they use.[28] The Board has found that a company's mere involvement in the acquisition of a vehicle weights against independent contractor status (even when a driver technically owns a vehicle). For example, in *FedEx*, drivers provided the trucks they obtained from outside sources. FedEx, however, dictated vehicle specifications, gave drivers a list of dealerships, and maintained a database to make it easier for drivers to transfer vehicles to each. This meant that "aspects of the instrumentalities factor cut both ways" and the factor was therefore "neutral" even though the drivers owned their own vehicles. *FedEx*, slip. op. at 13-14. In *Roadway*, drivers owned their own vehicles, but Roadway was even more intimately involved in the process. Roadway purchased specialty made vehicles, sold them to an independent leasing company, and recommended that leasing company to prospective drivers. Although the drivers obtained the trucks directly from the

[26] *See e.g.* (Tr. 2106-07 (IBT set its daily lease rate at $60 to cover its own payment for that truck)).

[27] Although this case found the drivers to be independent contractors under the Board's defunct "right to control" test, its pronouncements regarding tools and the typical employer is nonetheless instructive.

[28] The Union maintains that if the question did come before the Board, IBT's owner-operators would also be employees because the Board has specifically cautioned against placing undue emphasis on vehicle ownership. *R.W. Bozel Transfer, Inc.*, 304 NLRB 200, 200-01 (1991) (finding that owner-operators are employees and that "the Regional Director erred . . . by according too much weight to the fact that the owner-operators own their own trucks.").

company Roadway recommended, the Employer's involvement in this acquisition of the vehicles was one of the factors supporting a finding of employee status. *Roadway*, 326 NLRB at 844-45.

Here, IBT is heavily involved in the process. It explicitly selected, provides, and maintains control over the vehicles that over 80% of its workforce uses. Further, there is no validity to Respondent's argument that drivers made a "choice" about whether to obtain their vehicles from IBT or from outside sources. IBT readily admits that the vast majority of its drivers did not have the ability to obtain compliant green trucks when the clean truck program began. (Tr. 1686, 2076-77, 3929-30, 4126-27).). IBT wanted to keep its drivers rather than lose them, so it obtained 50 trucks for its drivers to use and provided those trucks to its drivers—first for free under Staffmark, then for a fee under IBT's new business model. (Tr. 1685-88). There was no evidence presented that drivers now have the ability and financial resources to obtain their own truck from outside IBT—and if every driver ever did so, IBT would be left with 50 trucks that would not be making money and would actually be losing money by just sitting there. Thus, drivers did not choose whether to obtain a truck from IBT or buy elsewhere. Drivers were unable, either financially or otherwise, to obtain trucks from outside sources and, needing to work to maintain themselves and their families, accepted the terms that IBT established for their continued employment—that they pay IBT for the daily use of the trucks that IBT had acquired and that drivers were already using under Staffmark.

In addition to the vehicles, IBT provides its drivers with nearly every single other instrumentality they use throughout the course of their day—drivers begin and end their day at the IBT yard where IBT stores their trucks,[29] drivers do not have their own chassis to move containers, (Tr. 2045-47, 2683, 3942-47), IBT requires that drivers wear vests in its yard and provides those

[29] And are in fact required to according to the terms of the weekly lease they sign every week. (GC. Exh. 16) . The ALJ found that this demonstrates control by IBT: "IBT through its dispatch process controls the place of work and through its requirement that drivers park in its yard controls the place in which the leased trucks are stored." (ALJD 15).

vests to the drivers. (Tr. 2927-28, 2397),[30] IBT provides the radio that is the main way drivers communicate with IBT personnel, (Tr. 3095-96, 3263-64, 485-86, 1406-07, 2933, 1097-98, 670-71, 856-57, 939, 485-86), IBT provides drivers with the insurance for their trucks, IBT provides drivers with a fuel card (Gc. Exh. 11), and IBT provides the plethora of paperwork that it requires on a daily basis (most branded with IBT's name) (Hours of Service Logs, Daily Inspection Reports for the trucks, delivery slips for the containers they move, and daily manifests to track movements). (Tr. 149, 419-20, 541, 676-78, 1103, 943-45, 1410-13, 1103-05; U. Exh 12; R. Exh. 4, 5, 13). With that said, the ALJ also correctly weighed the fact that "IBT does not supply all work clothes, any tools that they bring with them in the truck as well as personal cell phones or computers, printers or fax machines." (ALJD 15).[31] The ALJ properly found that the most "critical, important and necessary" items were supplied by IBT. (ALJD 15).

On balance, the record evidence supports a finding that this factor strongly favors employee status. In addition, this factor speaks directly to control and entrepreneurial opportunity. By being the source for every important instrumentality drivers use, IBT maintains a level of control—control strengthened by the implicit threat that if IBT can provide all these instrumentalities that allow drivers to complete IBT's work, IBT can also stop providing these instrumentalities and prevent drivers from earning a living. Further, the fact that drivers are reliant on IBT for all these instrumentalities drastically undercuts any possible argument about entrepreneurial opportunity—without these instrumentalities, drivers have no ability to seek out different companies who need trucking services. Instead, they are dependent on IBT and the only way for them to work for other companies is to find another company that *also* provides every single instrumentality the driver will

[30] Vests which at one point spelled out IBT, but are now just plain vests. (Tr. 2397, 2927-28). There is also a separate Port requirement that drivers wear vests while inside the Port.

[31] Although the ALJ mentions computers, printers, and fax machines, non-representative and discredited Cabral was the only driver to testify about using any of those items during the course of his workday.

need, including a truck. That choice is not indicative of any sort of entrepreneurial opportunity available to true independent contractors, it is only indicative of the ability that every single statutory employee across the country has—the ability to go find a second job or a new job.

5. IBT Directly and Indirectly Supervises Drivers' Performance

In arguing that drivers are free from supervision, Respondent not only ignores clear Board precedent, it mischaracterizes the weight of the evidentiary testimony provided by drivers. While the nature of trucking does not make physically proximate oversight necessary, there is no question that IBT supervises its drivers through the control it exercises over the performance of their work and through the use of various oversight tools. The Board has consistently found that supervision does not have to be in-person in order to indicate an employee-employer relationship. *FedEx*, 361 NLRB No. 55 at slip. op. 12-13.[32]

In addition, the Board has recognized that the nature of the work in question also comes into play and that certain work makes in-person supervision "highly impractical" for an employer. *Sisters Camelot*, 363 NLRB No. 13, slip op. at *3 (Sept. 25, 2015) (*citing Mitchell Bros. Truck Lines*, 249 NLRB 476, 481 (1980)). With trucking in particular, the Board has noted that "drivers generally drive the same routes . . . and therefore do not need much supervision." *Os Transp*, 358 NLRB 1048, 1063 (2012).[33] Thus, in *Os Transport*, the supervision factor supported a finding of employee status, even without constant in-person oversight, because "drivers come to the yard before the start and after the completion of their workday and are in constant contact with Respondent via the walkie-talkies or cell phones as to work routes that arise during the day." *Id.*

[32] *See also Sisters Camelot* 363 NLRB No. 13 (finding that even though the Employer did not have someone following its canvassers every minute of the day, its "extensive recordkeeping requirements demonstrate that the Respondent closely monitors canvassers' activities on a daily basis.").

[33] The decision in *OS Transport* was subsequently vacated in light of the Supreme Court's decision in *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014). A reconstituted Board, cured of its constitutional infirmities, subsequently re-affirmed the original OS Transport findings and conclusions in *OS Transp.*, 362 NLRB No. 34 (2015).

Despite Respondent's continued attempt to mischaracterize the record, it is clear that this is also true of IBT's drivers. Respondent claims that "drivers do not regularly receive calls from dispatchers during the day." (Resp Brf. 46). This, however, ignores testimony from many drivers about dispatchers calling them to check on their location, to give them special or urgent assignments, to give them assignments that correspond to the drivers' current location which the dispatchers could track, to check why drivers are not back at the yard, or to ask drivers why they are taking certain routes. (*see e.g.* Tr. 3232-33, 1408-09, 680-81, 490-92, 675, 1103). On top of that, IBT has structured its business to only give most drivers one movement at a time (Tr. 165, 667, 1004-09),[34] requiring drivers to call in for another assignment when they finish each movement (Tr. 2146, 2151-54, 3332; 4157). Because of this, it is not uncommon for drivers to check in with dispatchers up to eight times a day. (Tr. 4157-58).

Respondent disingenuously argues that a "driver simply goes home without requesting permission and typically without notifying anyone." (Resp. Brf. 46). Quite to the contrary, IBT requires that the trucks it leases to its drivers must be picked up and dropped off at the IBT yard. Thus, the return of the keys and radio to dispatch, and the turning in of other required paperwork, is clear notice to IBT that drivers have ended their day. Even if keys are left on the dispatcher's desk, the dispatcher will be able to tell who ended his day based on which keys are returned.[35] Similarly, one of the purposes of IBT requiring a weekly lease is to "know the availability of who we have for the work that we have to perform . . . that's one of the ways that we figure out . . . how we can set up that week." (Tr. 2096-97). Dispatchers have notice of who started work at what specific time in

[34] A "movement" consists of a round trip—a loaded container and an empty container. (Tr. 2133-34).

[35] IBT's witnesses testified that keys are turned into a box outside the dispatch office. This is not supported by bulk of the testimonial evidence from drivers stating that they return their keys directly to dispatch. (*see* Tr. 180, 1106, 2882-83, 2954, 2975). Further, a memorandum given to drivers instructs drivers that "all radios and keys must be turned into dispatch at the end of each shift"—drivers can also leave them with the IBT guard if the dispatch office is empty, but then they risk monetary penalties if dispatch does not get those keys to dispatch the truck. (U. Exh. 5).

accordance with when drivers pick up keys and a radio at the dispatch window. Therefore, IBT is not "absen[t] during the pick-up, drop-off, and driving process" as IBT alleges. (Resp Exp. 46). Instead, like in *Os Transport*, 358 NLRB at 1063, "drivers come to the yard before the start and after the completion of their workday and are in constant contact with Respondent." This is strong support for a finding of employee status.

Another example of mischaracterization is Respondent's statement that "IBT drivers are not subject to proficiency tests or ride alongs." (Resp. Brf. 46). This again ignores Bradley's admission that he *does* observe, at the IBT yard, whether drivers have the skills to perform certain tasks and uses that information to fill out "proficiency tests" (Tr. 1708-09), that he affirmed on various Road Test forms that he had completed a fourteen mile road test with IBT's drivers (Tr. 1974-79), and that he did go on the road with the Staffmark drivers (many of whom transitioned to IBT's current model and make up a large percentage of the current workforce). (Tr. 1975).[36]

Respondent also errs by claiming that IBT is unburdened by rules and that IBT does not discipline drivers for violating rules. (Resp Brf. 47). The record makes clear that IBT distributes a plethora of manuals, memoranda, and policies which, by their very terms, drivers are required to comply with under the threat of discipline. Although the full extent of IBT's control over drivers will be detailed in the subsequent section dealing with the control factor, it worth noting at this point that the ALJ correctly found that:

> In essence, the actual order of delivery, place and manner of the delivery of goods along with to who goods are delivered, as well as how much is charged for the

[36] Respondent attempts to challenge the ALJs finding that IBT requires drivers to comply with IBT's customer contracts by, for example, assessing a $10 fee on drivers who fail to collect and turn in certain information required by a customer. (Resp. Brf. 49; *see* U. Exh. 6). Respondent's objection, however, is semantic. IBT's Comptroller/accounts manager testified that IBT decided to give drivers an extra $10 incentive for each completed leg of a move using a clean truck. This incentive was automatic for all routes, with one exception: drivers would only receive the $10 incentive on a Target load if they provided IBT with certain information required by Target. [Tr. 2631-32]. So in the eyes of a driver, they would get this incentive for every route they completed *unless they did not turn in the information IBT required*. [Tr. 1537-38]. Whether a "deduction" or not, this is clearly a way to ensure drivers comply with IBT's requirements.

> delivery is strictly controlled by IBT. . . Thus, *the most important aspects of the job are undeniably controlled and directly or indirectly supervised by IBT*.

(ALJD 14). This control further negates the need for in-person supervision because IBT knows that it has instilled its rules and policies into drivers and that its long term drivers will comply with those rules. In addition, IBT's requirement that drivers fill out and turn in a plethora of paperwork every day—from inspection reports, to daily logs, to manifests, to delivery slips[37]—mirrors the extensive paperwork required by the Employer in *Sisters Camelot*, supra, which serves a supervisorial purpose. As in that case, these "extensive recordkeeping requirements demonstrate that the Respondent closely monitors [drivers] activities on a daily basis." *Id.*

Finally, Respondent errs by trying to discount the importance of its GPS tracking systems on these vehicles. The evidence in the record makes clear that IBT actively used the GPS tracking system it installed in trucks to monitor the day-to-day work actually being done by drivers, and that this monitoring affected the instructions IBT gave to drivers.[38] Multiple drivers testified that dispatchers had access to these GPS systems and would look up the location of certain trucks, they would sometimes call drivers to inquire why drivers were at a certain location, to give them assignments that corresponded to the drivers' location, and to inquire as to why they were taking certain routes. (Tr. 1408-09, 490-91, 674-75, 941-42). In fact, IBT even used these GPS tracking systems to discover that drivers were speeding too often, and then decided to install speed limiters on its trucks—directly limiting and controlling how fast drivers can complete their work. (Tr. 174-76, 261-63, 537-38, 675-76, 914, 942-43, 1101-02, 1246-47, 1410, 1509). In sum, the dispatchers would actively use the GPS systems to monitor the drivers and structure the drivers' work. In fact,

[37] Most of these documents are not required by state or federal law or regulation.

[38] IBT's claim that the new trucks they lease have not had their GPS turned on does not change the balance of this factor—IBT's decision not to activate those GPS devices can also be seen as part of IBT's efforts to color the record in its favor, considering the fact that the new trucks were not acquired until early 2016—well after IBT became aware of the drivers' protected activity and only months before the instant hearing.

Operations Manager Rob Kirkbride, who oversaw the dispatchers, admitted on the stand that dispatchers did use the GPS system for purposes of "cargo management." (Tr 4150-53).[39] Thus, there is no validity to IBT's apparent argument that its GPS systems were solely for customers tracking shipment—it was clearly used to monitor drivers for the benefit of IBT's efficiency and profitability from moving more cargo. (Resp. Brf. 48 (citing *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989)).[40]

Thus, IBT exercised pervasive control over its drivers, and effectively supervised them through that control, through its dispatchers, through the use of a GPS system, and through its detailed recordkeeping requirements. This factor, therefore, strongly supports employee status.[41]

6. Method of Payment Supports a Finding of Employee Status

Respondent's argument that the method of payment supports independent contractor status fails. While it is true that a portion of the driver's pay is ostensibly per load,[42] this does not make the drivers independent contractors both because "piece-rate" compensation is consistent with employee status and because every single other component that is considered under this factor strongly supports a finding of employee status. In fact, IBT's unilateral decision to institute this

---

[39] This admission again shows the unreliability of IBT's testimony—Assistant Vice-President Zea testified, in direct contradiction to Bradley's testimony, that dispatchers are unable to access the GPS system. (Tr. 2072).

[40] Even if the GPS systems were used solely to inform customers about the location of cargo, this would still constitute supervision (and control) by the Employer. With every customer requirement imposed on IBT, IBT made the business decision to agree to the requirement with full knowledge that it would then have to exercise some level of control over its drivers to comply with its customers' requirements. Thus, as IBT's actions led to the requirements, and complying must be seen as evidence of control and supervision by IBT regardless of the fact that they can also be called "customer requirements." Further, Respondents string citation to cases dealing with two-way radios, or reporting requirements, or tracking systems is unpersuasive because the cases do not appear to involve the Board's standard.

[41] Judge Wedekind reached a similar decision based on the extremely analogous facts in *Green Fleet*, finding that this factor supported employee status because Green Fleet's lease drivers "obtained their assignments from . . . company dispatchers . . . and submitted their daily manifest and truck inspection forms to the Company . . . at the end of their shift," all while being required to abide by company policies. *Green Fleet Sys*, 2015 WL 1619964.

[42] Drivers' payment "per load" is actually correlated to number of hours worked because IBT calculated this rate based on the distance of each customer. In other words, IBT knew that it would take longer to get to a customer that is far away, so it made the rate for that route slightly higher. This direct connection between distance and compensation makes this alleged per-load rate system strongly resemble a traditional hourly wage where drivers earn more for working more hours, especially when the hourly rate paid for waiting time at the Port is also considered.

piece-rate compensation system actually allowed IBT to exercise indirect control over ensuring that its drivers work harder and faster by tying its drivers' compensation to IBT's own financial interests—just as piece rate employees are also incentivized to work harder and faster. Coupled with other business decisions made by IBT, this economic structure has given IBT control with the least amount of effort or resources necessary.

IBT also unilaterally made the decision to provide its drivers with weekly paychecks and not offer direct deposit, forcing drivers to show up at the IBT yard in order to be paid. (Tr. 1766-67). This weekly structure thus resembles a regular pay-day for employees more so than it does a compensation system for independent contractors which is typically based on invoices, whereby contractors get paid at the culmination of the job or project. Further, IBT's statement that federal law requires drivers to be paid within 15 days, (Resp. Brf. 57), does not translate into a mandate for setting up a weekly payment structure for requiring that drivers show up at the yard[43]—IBT could have structured its payments through direct deposit at the completion of each route by each driver and still have complied with federal law. Instead, IBT consciously structured its distribution of checks like countless other employers. This also gave IBT what is essentially a captive audience every Friday, and IBT took advantage by distributing work rules with drivers' paychecks and by having drivers sign various agreements while picking up their checks.

In addition, "IBT regulates and controls the rates of compensation for delivery assignments, wait time, fuel charges, rates charged to customers and discretionary reduction of the leasing fees." ALJD 16. In fact, this very area is one of the places where IBT took affirmative steps to manufacture evidence and color the record with "sham negotiations" in order to "simply make it appear that drivers had some ability to negotiate rates when in reality they did not." (ALJD 10).[44]

[43] California also only requires that wages be paid "twice during each calendar month." Cal. Lab. Code § 204.

[44] The evidence of this sham is abundant in the record. No driver presented who provided detailed testimony about individualized negotiations before 2015. Zea admits that before 2015 there was a standardized rate book for all

The ALJ unequivocally and properly determined that there is no real negotiation and IBT has control over rates. This supports a finding of employee status because Respondent "establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers." *Roadway*, 326 NLRB at 852; *FedEx*, 361 NLRB No. 55 slip op. at 14.

Further, the Board has stated that a company's insulation of drivers against economic loss also supports a finding of employee status. *FedEx*, supra (guaranteed compensation). Although IBT points out that IBT drivers do not have any guaranteed income, IBT has otherwise insulated its drivers from economic loss. By eliminating the minimum rental commitment and only making drivers pay for the truck on the days that they work, IBT is insulating drivers from going into debt if they have an extended period of not being able to drive. IBT's initial acquisition of the 50 trucks also insulated drivers from having to make any investment for those trucks. IBT's payment of an hourly "wait-time" ensures drivers do not lose money as a result of extremely congested ports. In addition, this unilaterally instituted payment also serves IBT's business interests by incentivizing drivers to wait with the containers.

The ALJ correctly discounts any significance given to the fact that IBT's drivers do not receive fringe benefits or that drivers receive 1099 forms instead of W2 forms. Case law makes clear that this unilateral choice by an employer is insufficient to turn an employee into an independent contractor because the it is up to the employer and because plenty of bona fide

drivers, and that IBT unilaterally changed those rates at will. (Tr. 2261-64; 2274-76; 2279). A detailed examination of settlement statements demonstrates near perfect uniformity in the amount drivers earned for the same route (including uniformity when the routes had special notations)—only one single driver had a different rate than other drivers for completing the same run. (U. Exh. 59). Further, testimony and evidence from 2015 and after demonstrates that any alleged negotiation was nothing more than a unilaterally decided on rise being offered to employees but unartfully disguised as alleged negotiations. (Tr. 1117-23; 1253-56; 1274-75, 2269-74, 2295, 2465-67, 2478-79; 2471-75, 2491-95, 2577-79; GC Ehx. 124, 125, 127, 139).

employees also do not receive fringe benefits. *Time Auto.*, 338 NLRB 626 (2002).[45] Indeed, one of the motivations for misclassification is precisely the denial to employees of such benefits and protections. Thus, "on balance the method of payment favors employee status.

7. IBT Exerts Significant Control Over Its Drivers

IBT's pervasive control of its drivers is abundantly apparent in the record, including the control exerted by IBT through unilaterally structuring its relationship with its drivers. This was made easier for IBT by the fact that, by its very nature, trucking work—and drayage work in particular—allows for employers to provide its employee drivers with some flexibility while still having a reliable workforce that it can count on to do its work. In many instances, the containers that must be delivered are fungible—IBT does not care which specific driver moves which container, as long as the container gets moved. Trucking also does not require employers to dictate specific routes that drivers must take or to have someone else in the truck to supervise the driver while he is making a delivery—there are only so many possible routes when you are going from fixed Ports to a few customers at fixed locations. Thus, in all the ways described below, IBT exercises control over drivers and thus exhibits an employee-employer relationship.

(a) IBT Controls the Means and Manner of Drivers' Work Through Detailed Work Rules

Abundant record evidence supports the ALJ's findings that "[o]n the job, IBT maintains a variety of work rules, including rules that specifically control the driver's job performance." (ALJD 12). These rules are contained in a handbooks given by IBT to its drivers, and in a profusion of memorandum and other policies that IBT distributes to its drivers.[46]

---

[45] *See also Stamford Taxi*, 332 NLRB at 1385 ("Under these circumstances, the drivers have no choice but to file tax returns as independent contractors, listing their business income, and itemizing expenses in a schedule C as part of their Federal tax return.").

[46] (*see e.g.* GC Exh. 47, 48, 49, 71-76, 83, 95, U. Exh. 1-6, 29-33, 35).

The first of these documents worth highlighting is the Safety and Security policies/handbook that IBT provides its drivers—one version was given to drivers before 2014, and the amended version was provided to drivers after 2014. (Tr. 1366-67, 1064-65, 736-38).[47] At the hearing, IBT claimed that these documents only contain "helpful hints" for the drivers to consider. (Tr. 1789-97, 2019-21). The record contradicts this assertion. The older version of the manual stated that drivers "shall comply with the requirements set forth in this policy," and threatens that "failure to comply . . . may result in removal . . . from IBT's contractor list," (GC Exh. 71 at IBT02832). Further, the acknowledgement that IBT had drivers sign when they received this manual stated that the manual must be "strictly adhered to." (Tr. 732-36, U. Exh. 35). Although this manual was amended in 2014 to remove some of this language—most likely part of IBT's continued attempt to manufacture evidence and color the record—drivers who were handed this new version of the agreement would reasonably assume that the agreement also contained rules that they were required to follow.

Thus, as the ALJ found, "IBT had in place safety rules policies and procedures in the form of a driver handbook which set forth the companies policies and procedures to be followed by the drivers," including "loading and accident procedures . . . as well as customer service, safety, inspections, drug and alcohol testing, and hours of service." (ALJD 12). For example, the prior version of this manual demanded "perfect service" from drivers. (GC Exh. 71 at IBT02833). It identified drivers as "the company's most visible representatives" and threatened corrective action for "negative road observations" reported to IBT. (GC Exh. 71 at IBT02840-41). It also included Conduct and Appearance standards for drivers, and IBT's drug testing policy for its drivers. (GC. Exh. 71 at IBT02836-38). The new version has a whole section proscribing processes to follow

[47] Although Respondent may argue that the Board should not rely on the old handbook, it is highly relevant because the majority of IBT's workforce was with IBT while that agreement was operative, and because IBT's campaign of manufacturing evidence makes any changes to this agreement in 2014 suspect—especially when IBT admits that there was no concurrent change in business operations in 2014. (Tr. 1716-18, 1746, 1799-1803, 2090-92).

while handling cargo, including instructions that: "Contractors should not contact a customer to change a scheduled load or unload appointment," "Contractors should report all expected customer service delays of 10 minutes or more," drivers should never take loads home, and drivers cannot drop off loads without proper authorization. (GC. Exh. 71 at 02910-12). A section on Hijacking instructs drivers not to fight any possible hijacking. *Id*. The handbook also instructs drivers not to attempt to resolve any issues that arise at a customer's location, and to instead report the issues to dispatch. (GC. Exh. 71 at 02913). And a "California Only" section in the manual informs drivers that a tracking device will be placed in each vehicle bearing an IBT placard. *Id.*

These types of detailed work rules are quintessential examples of control by an employer indicating employee status. *Slay Transp. Co.*, 331 NLRB at 1294 (Finding owner-operators to be statutory employees because, in part, "[t]he owner-operators are responsible for following the policies and procedures outlined in the Employer's employee manual."). IBT did not stop with just the manual—it also handed out and posted various memoranda and notices to drivers. (Tr. 2011-14, 1439-44, 2554-56, 3750, U. Exh. 48)[48]. Some examples of the memoranda handed out to drivers are: memoranda instructing drivers how to fill out manifests and logs, and setting procedures and timelines for turning in those documents, (GC. Exh. 47, 48, 74, 75, U. Exh.1, 3, 4, 6), memoranda regarding safety meetings for drivers (GC Exh. 49, 76, U. Exh. 32), memoranda regarding cleaning the trucks and turning in keys and radios on time (U. Exh. 2, 5), a memorandum instructing drivers on procedures to take with the truck at the end of their shift (U. Exh. 33), and memoranda regarding inspections and road checks—with instructions for what drivers need to do to avoid violations. (GC Exh. 83, 96, Tr. 1881-83).

[48] IBT's chosen method of payment allowed it to ensure drivers would be at the yard to pick up their checks on Friday, allowing IBT to distribute work rules and agreements to its entire workforce within a few hour period.

IBT also provides drivers with copies of other procedures it has established or enforces. For example, IBT handed out a document titled "CSA 2010.". This document describes a new point system instituted by the DOT which gives points to drivers and carriers for certain safety violations. Although this point system was developed by the DOT, IBT decided, on its own, to add threatened discipline for any driver who failed to comply with the CSA—ostensibly to protect its own safety score and appeal to customers. (Tr. 1879-81, 3980-81, 3814-16, 3840, 1980-84, 3824-26, GC Exh. 95).[49] IBT also provided drivers with the "IBT Container, Cargo & Security Procedures." (Tr. 2005-07, U. Exh. 29). This document was developed by IBT and includes procedures for drivers to follow when completing deliveries, including: how to inspect a sealed container, how to check a chassis, rules while in transit, and procedures for paperwork. This document also states that "IBT has a zero tolerance policy regarding loaded or unloaded containers that are dropped and left unsecured without authorization. Container Cargo is to go directly from the pick-up point to the destination without stopping" (unless the vehicle breaks down, the driver is subject to a mandatory rest period, or *dispatchers give the driver special instructions*). (Tr. 2005-07, U Exh. 29).

Thus, as in *Pennsylvania Interscholatic Athletic Ass'n, Inc.*, 365 NLRB No. 107 (July 11, 2017), IBT "maintains a variety of work rules, including rules that specifically control the [drivers'] job performance. Moreover, although [drivers] are not directly supervised [on the road] (insofar as no one from [IBT] is physically present to watch them [drive]), there are mechanisms in place by which the [drivers] are held accountable to [IBT] for their [] performance and which may result in discipline." Further, IBT's detailed work rules often surpass the requirements imposed by federal law or institute requirements not at all contemplated by federal law. Thus, these rules

[49] Unsafe driving can result in "time off up to and including lease termination;" fatigued driving will lead to "at least one day without work;" unfit operation will lead to "at least one day without work;" controlled substance violation will lead to lease termination; vehicle maintenance and cargo related violations will lead to "at least one day without work," and, generally, out of service violations "can result in discipline up to and including termination of lease; depending on their severity." (GC Exh. 95).

demonstrate "pervasive" control even if drivers "have some discretion over certain aspects of the means and manner of their work." *Id.*

(b) IBT Uses Progressive Discipline and Threats to Enforce Its Rules

IBT has established a progressive discipline policy for its drivers. (ALJD 6, 9, 11). The first step of discipline is a warning, the second step is one day out of service, the third step is three days out of service, and the fourth step is termination of the driver's contract. (Tr. 1807-08, 3873-74). Initially, IBT claimed that this policy was only applied when a driver committed a violation of federal law, and that IBT was actually required to take corrective action against drivers who violated federal law—such as by going over their allowed hours of service. (Tr. 1807-08, 1823, 1994, GC Exh. 79). Neither of these contentions is true.

When presented with documentary evidence, IBT admitted that it does use progressive discipline even in instances where a driver does not violate federal law. For example, Bradley initially claimed that IBT does not put drivers out of service for failure to inspect their trucks. (Tr. 1994-96). When shown a two day suspension that he issued to a driver for failure to inspect his truck, Bradley admitted he had issued this discipline and had gotten Zea's approval before doing so. (Tr. 1823-24, GC Exh. 80). In another instance, a driver was "verbally spoken to for comprehension" because he had failed to fill out a daily inspection report. (Tr. 1857, GC Exh. 84).

Bradley also stated that drivers had never been put out of service for not checking a radio frequency tag on the truck. When presented with an email he wrote explaining that a driver was put out of service for "cho[osing] not to follow any of [IBT's] instructions" regarding a defective radio frequency tag, Bradley admitted that IBT had put drivers out of service for this reason. (Tr. 1996-97, GC Exh. 81). On the suspension form, Bradley also explicitly wrote that this driver was given a "1 day suspension" for not "following of direction." (Tr. 1994-96, U Exh. 26).

Other drivers have been put out of service for damaging a door at the IBT facility, (Tr. 1196-97, U. Exh. 27), or for not signing their Weekly Lease. (Tr. 1786-87, GC Exh. 70). Finally, Bradley initially testified that IBT does not apply its progressive discipline system when drivers have accidents or inform insurance of corrective action. He changed his tune, however, when he was presented with an email in which Bradley responds to an inquiry from insurance by saying that he spoke to a driver about his conduct and that the driver "has taken days off for these incidents as corrective action." (Tr. 2022-25; U. Exh. 36) Bradley's superior at IBT corporate also informs the insurance company: "Yes we have a corrective action program and he is on final warning." *Id.*

When IBT reaches the point of terminating a driver's contract, IBT fills out an "Employee Exit Interview/Termination Report." (Tr. 1905-07, GC Exh. 101). There is an example of this form being used as late as September 2015. (GC Exh. 101). On this Employee Exit Interview, IBT selects reasons for the termination. Six examples demonstrate IBT terminating contracts for "Failure to Report to Work (no show/no call)." (U. Exh. 28, GC Exh. 100). In one instance a driver's contract was terminated for an expired medical card. (GC Exh. 101). Finally, there was a situation where IBT almost terminated a driver's contract for, in part, "Breach of company rules" and "dishonesty," but exercised discretion to allow this driver to continue working. (Tr. 1989-93, U. Exh. 25).

The Board should reject any attempt to discredit these clear examples of employer control as infrequent or outside the limitations period. As the Board noted in *Sisters Camelot*, "[e]ven such occasional instances of discipline indicate significant control by" an employer. 363 NLRB No. 13, Slip op. at *2 (citing *Dial-A-Mattress.,* 326 NLRB 884, 892-93 (1998)). This is particularly true when drivers have been working exclusively for IBT for years and they operate as an integrated part of IBT's workforce—none of them own their own trucks or have their own operating authority. Wanting to stay on IBT's good side, even occasional instances of discipline or threats of discipline will be taken seriously by drivers, and over time drivers will have learned IBT's policies and how to

best function within IBT's system without rocking the boat. IBT has thus enforced its extensive work rules with progressive discipline, an undeniable sign of employee status.

(c) IBT's Rules and Requirements Exceed Federal Requirements

IBT argues that much of the control cited above comes as a result of government regulation and should therefore not be imputed to IBT. (Resp. Brf. 42). Even when governmental regulation is substantial, however, an Employer's exercise of control beyond that required by law is an indication of employee status. *Stamford Taxi, Inc.*, 332 NLRB 1372, 1385 (2000) ("None of the following rules described are mandated by the DOT. Because in this instance as well as a number of others, Respondent's pervasive control exceeds governmental regulations to a significant degree, employees status is justified."); *Local 814*, 208 NLRB 276, 278 (1974) ("[A]lthough Form B, . . . has eliminated the obligation of owners to comply with rules and instructions . . . in actual practice those carriers continue to promulgate, and insist upon compliance by the owners with, various directives, bulletins, and instructions, many of which relate to matters beyond the ambit of governmental controls, and to discipline owners for noncompliance therewith.").

Here, the majority of the policies and requirements that IBT establishes cannot be attributed solely to government regulation—they are instead creatures of IBT discretion in running its business in a profitable way and a result of IBT cultivating a positive image or brand to help it obtain and retain customers. Respondent's brief specifically cited the following areas as ones where the ALJ insufficiently considered government control: "entry level driver tests and training, as well as road proficiency information, Hazardous Materials testing, and a requirement to turn in hours of service logs." (Resp Brf. 42). Respondent mischaracterizes the applicable federal regulations and, in actuality, IBT goes further than the federal regulations in virtually every one of these areas.

With respect to entry level driver tests, IBT claims that the regulations "requir[e] motor carriers to conduct training for entry level drivers, including independent contractors." That is an

incorrect reading of the applicable regulations. While 49 CFR 380.501-509 requires *drivers* to obtain certain entry-level training, and motor carriers to check that its new drivers have obtained that training, nothing in the regulation requires IBT to provide this training itself. IBT could have complied solely by contracting only with drivers who have already obtained that training elsewhere. Instead, IBT decided to act like a traditional employer and provide this test itself. Similarly, 49 CFR 172.702-704 requires Hazardous materials training, but makes it clear that "[t]raining may be provided by the hazmat employer or other public or private sources." 49 CFR 172.702. Again, rather than just placing the onus on its alleged independent drivers to ensure they have this training, IBT treated its drivers as an employer treats its employees by providing this training itself to its drivers free of charge—in some instances doing it more often than the federal regulations require. (Tr. 1980-84, 3838-40, 1708, 1980-84, 3838-40, 1708-11; U. Exh. 24; *see* 49 CFR 172.704).

In terms of employee logs, IBT claims that 49 CFR 395.3 and 395.8 "require hours of service logs and logbooks." In making this assertion, however, Respondent ignores the fact that "short-haul" drivers are exempt from these requirement. This exemption applies if "(i) The driver operates within a 100 air-mile radius of the normal work reporting location [and] (ii)(A) The driver . . . returns to the work reporting location and is released from work within 12 consecutive hours." 49 CFR 395.1. In this case, IBT's furthest customer is 60 miles away, well within the 100 air-mile radius, and drivers must pick up and return their trucks within 11 hours according to the weekly lease. Thus, the majority of the time, IBT's drivers are not actually required under federal law to fill out logs and turn them in to IBT. Yet IBT requires them to do so nonetheless.

All that is actually legally required is that the carrier itself retain a six month record of the time the driver reports to work, the number of hours on duty, and the time the driver is released from duty. *Id.* IBT could satisfy this requirement by referencing driver manifests—which are also not required by federal law, but which every IBT driver must fill out per IBT policy—or by having

dispatchers track when drivers pick up and drop off their truck. Instead, IBT forced drivers to fill out and turn in hour of service logs weekly, even disciplining drivers if they do not turn it in within seven days and threatening termination (Tr. 937-38; 1094-97; 483-85; 3418-19; 3795; 3821; GC Exh 78)—even though federal law only requires that logs, when required, are turned in every thirteen days. 49 CFR 395.8. Thus, IBT's log requirements and enforcement of those requirements are not mere government control but are direct control imposed by IBT on its drivers.

The most absurd claim that IBT makes is that its progressive discipline system should not be used as evidence of an employment relationship. This claim is non-sensical. Even assuming that IBT is correct that its safety rating is tied to ensuring adequate "management controls are in place," there is nothing in the federal regulations which proscribe that IBT *must* institute a progressive discipline system in order to comply with regulations, or that it must discipline drivers for certain infractions. While IBT could have come up with many ways of meeting the federal requirement, IBT immediately jumped to one of the hallmarks of an employee-employer relationship—a progressive discipline policy that allows an employer to protect is investment in its workforce by helping to train them through corrective discipline. Like any other employer who has made an investment in his employees, IBT wants to salvage this investment by giving its drivers notice of the mistakes they are making and a chance to improve their conduct. This type of relationship is inconsistent with a relationship between truly independent businesses but consistent with an employee-employer relationship. Thus, IBT's choice to use this particular method of discipline must be seen as a strong indicator of employee status.

Finally, it is worth noting a few other areas where IBT's control plainly exceed that required by law: (1) IBT's Drug and Alcohol Policy, by its very terms, is stricter than federally required. The policy itself states that "IBT's policy in certain instances may be more stringent." It then explains that "It is IBT's policy that anyone with any amount of alcohol in his or her breath sample while

under dispatch to IBT will be removed from the approved contractor list." This includes blood alcohol levels of .01 and higher." However, under federal regulations, a driver "found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall not perform, nor be permitted to perform, safety-sensitive functions for at least 24 hours" and does not include sanctions for driver with a .01 level. Nor does federal law require termination of a driver who suffers a positive drug test. (GC Exh. 73 at IBT05062-63); (2) IBT requires that its drivers to be 23 years of age. Federal law only requires that commercial drivers be 21. 49 CFR 391.11; (3) While federal law requires an application for drivers, it does not require some of the information requested in IBT's original application—such as educational history—and does not dictate what the application must be called. 49 CFR 391.11; (4) IBT's entry-level requirements for its drivers exceed the minimum requirements for drivers under federal law; and (5) IBT claims that safety programs such as the CSA 2010 should not be considered control because they are a federal safety tracking mechanism. The discipline threatened in the handout IBT gave drivers, however, is not required by federal law. That discipline was decided on and imposed exclusively by IBT, to protect its own safety reputation by forcing its drivers to maintain good scores. (GC Exh. 95).

In these ways, IBT's extensive control over drivers exceeds the control required by law in nearly every instance. Thus, as in *Elite Limousine Plus*, 324 NLRB 992, 1003 (1997), "the Employer has essentially micromanaged the drivers on issues that do not involve government regulations and has imposed a detailed and severe system of sanctions to enforce the rules it wants the drivers to follow." These are strong indicators of employee status.

(d) IBT Controls Drivers' Work Days and Work Times

IBT continually trumpets the fact that drivers can choose what days to work and what time to start. This, however, ignores the fact that IBT has effectively constrained these choices for drivers. Because of IBT's piece-rate payment structure, IBT's drivers are inherently incentivized to

work as long and as hard as possible in order to eke out a living. By starting dispatch at a specific time for each shift—rather than, for example, setting up a computer program where drivers could take assignments at any time of day—and by limiting drivers to having their trucks for eleven hours, IBT is essentially ensuring that drivers will show up as close to that dispatch time as possible in order to work as long as possible within the constraints imposed by IBT. And the reality reflects these constraints—on the day shift, eighty percent of drivers are already waiting at IBT's facility by the time dispatch starts. (Tr. 3331-32, 3373). Even the small variation that will occur in this system benefits IBT—IBT cannot dispatch every driver at once, so it is actually beneficial for the employer if some drivers trickle in in the hours after dispatch starts. For these reasons, the Board should find that drivers do not have actual control over when or how regularly they work.

The record also makes it clear that drivers were not given a choice as to which shift to work. (Tr. 1304-05, 1361, 1585-86, 119-20, 1489-90). Zea admitted that a driver's shift is dependent on IBT having trucks available. (Tr. 2084-87). Drivers testified that they are not able to switch shifts without approval from IBT. (Tr. 2931-32, 1611, 1251-52). Bradley himself could not confirm that a night shift driver who shows up during the day would actually receive any work and be dispatched. (Tr. 1734-35). In fact, the Safety Department used to keep a list of the drivers who wanted to switch shifts but were waiting for approval. (Tr. 1735-36).[50] Thus, despite IBT's claims to the contrary, the record supports a finding that IBT controls drivers' shifts by assigning drivers to one shift and limiting them to that shift.[51] Further, the evidence makes it clear that IBT indirectly controls the

[50] Respondent places undue emphasis on an alleged situation involving driver Zavala, who was not called to testify. Yet, IBT claims Zavala changed his shift by checking a different box on the weekly lease. IBT's reliance on this is suspect—this occurred only "two or three months" before the hearing and was the only example provided. (Tr. 2857-58). Further, Zavala began working at IBT in 2012, and there is no evidence that he had ever taken this alleged action before. (GC Exh. 54), Further, no other driver had ever checked a different box without permission. (Tr. 2857-58).

[51] A Regional Director's reasoning in *BWI Taxi* is instructive: in finding that the taxi drivers at issue were statutory employees, the Regional Director relied, in part, on the fact that the Employer "established two shifts for owner-operators," even though "[w]ithin this 15-hour window, drivers control their times." *BWI Taxi*, 2010 WL

times the drivers begin and end their work through its dispatch structure. This type of "control over drivers' hours and shifts [by an employer] is [an] indication that its drivers are employees, rather than independent contractors." *Yellow Cab Co.*, 312 NLRB 142, 145 (1993).

Even if the Board were to find that drivers do have some control over what days to work and what time to start, these facts do not support a finding of independent contractor status when viewed in the context of the other extensive control that IBT exercises over its drivers.[52] In *Sisters Camelot*, 363 NLRB No. 13, slip op. at 2, the Board found that door-to-door canvassers were statutory employees despite the fact that "canvassers [were] not required to report for work on any given day." This is because canvassers were "subject to significant control by the [Employer] when they do [show up to] work." *Id.* IBT attempts to distinguish this case from *Sisters Camelot* by claiming that, unlike *Sisters Camelot*, when a driver does choose to show up to work, IBT does not tell drivers exactly what time to start or what time to end their day or what area to work in. Respondent also attempts to distinguish the case by pointing out that the employer in *Sisters Camelot* had been shown to exact discipline for misconduct.

Yet, rather than distinguish the case at hand, these points actually support reaching the same conclusion in this case as in *Sisters Camelot*. Although IBT does not dictate exactly what time drivers show up, it does indirectly control that time through its control of dispatch. IBT also tells drivers where to work by its control of the dispatch process. The gravamen of the *Sister Camelot* decision is that an employer's exercise of significant control once a driver does show up to work, in

---

4836874 at *5. IBT goes even further than the Employer in *BWI* by indirectly controlling even what time drivers start work.

[52] Respondent emphasizes the claim that "drivers in fact generally do not even tell IBT whether they plan on providing services or will instead not show up." Resp. Brf. 27. Even assuming this is true, IBT has admitted that one of the reasons it has drivers fill out a weekly lease agreement for the truck *is so that IBT knows how many people will be working that week*—this allows IBT to plan out how much work it will be able to complete that following week. (Tr. 2096-97). When coupled with the fact that drivers' longevity allows IBT to build up a profile of what time each driver normally shows up to work, it is clear that IBT has found an indirect way of keeping itself abreast of what drivers will show up. In fact, IBT could not function without a stable influx of its drivers daily.

whatever form that control takes, is sufficient to counteract any freedom that comes from the driver being able to choose when to work. In this case, there is no question that the control that IBT exerts over drivers' work is significant and extensive. Finally, as in *Sisters Camelot*, it has been shown that IBT does exact discipline for misconduct. Thus, even assuming for the sake of argument that drivers were free to choose when to work and when not to work, IBT exercises extensive control over drivers when they do show up to work and this supports a finding of employee status.

(e) IBT Controls the Assigning of Work to Drivers

The testimony at trial demonstrates that until April 2015, when IBT's drivers first went on strike, drivers were not given a choice of assignments by dispatchers. (Tr. 1052, 1660, 1091-93, 1394-96, 1139, 1603-06). Drivers testified that before this first strike, they were told they could not reject loads and dispatchers would retaliate against drivers who refused assignments by giving them less desirable assignments. This resulted in some drivers, to this day, not rejecting loads and accepting whatever assignment is offered by dispatch. (Tr. 1651-52, 1397-98, 877-78, 170-72).[53] Even now, dispatchers refer to "good drivers" who will accept whatever assignment is offered to them and do not reject assignments, (Tr. 3327-30), and IBT admits that the night shift drivers rarely, if ever, reject assignments. (Tr. 2749-53). Dispatcher Quevedo has even told drivers to go talk to his brother—Zea—if they are not happy with the loads they are receiving. (Tr. 3746-47). This type of control over the work done by drivers is indicative of an employee-employer relationship.[54]

[53] IBT introduced logs that it claims document the instances in which drivers refused assignments. R62-81. These documents are suspect, however, because Zea admits that these document only began to be maintained in response to a lawsuit alleging misclassification. (Tr. 3959-60, 2072-73, 4122-23, 3551-55, 2163-67). Further, these logs appear to target union supporters (even mentioning drivers picketing). (Tr. 2090-91, 2200-04, 2228, 3664-77, 3693-95, GC Exh. 110). Finally, it is curious that these logs do not focus just on refusals—they also mentions other instances not involving refusals, such as when a driver did not want to "follow the rules." (GC Exh. 111, GC Exh. 81).

[54] Any claim to the contrary by IBT, that it has always allowed drivers to pick assignment without retaliation, should be discounted as part of IBT's effort to manufacture evidence to color the record. Similarly, any change that occurred after drivers began engaging in protected concerted activity should not be given any weight because they are nothing more than superficial, self-serving changes meant to mask the drivers' misclassification.

Even assuming for the sake of argument that IBT did begin to give drivers limited options and an ability to reject assignments after April 2015, these options are effectively limited by IBT. First, and most importantly, any choices that are given to drivers have to flow through dispatchers and the drivers' "choices" are dependent on what the dispatchers decide to offer. While IBT claims that dispatchers give drivers a choice between the full "menu" of available options, testimony at trial refutes this contention. Dispatcher Moreno admitted that he does not consider all available assignments when he begins dispatch and that he does not offer later appointments to drivers initially because he saves them for later. (Tr. 3290-91). Dispatcher Nunez also admitted that it would be impossible for him to offer every single driver all of the 150 loads he might have available for a night. (Tr. 2747-48). Drivers themselves are aware that they do not get offered every available load because they will often talk to the driver immediately before or after them in the dispatch line, and those drivers will have been offered different assignments. (Tr. 480-83, 538-39, 410-11).

In fact, even Zea himself admits that dispatchers make a choice about efficiency and only offer "everything that's available that is within the range that's going to be profitable for the driver." (Tr. 2148-51). While framed as being for the benefit of drivers, it is equally true that this is for the benefit of IBT and what that statement makes abundantly clear is that *dispatchers retain the ability to make those decisions about efficiency and to choose what to offer drivers based on those choices.* Testimony at trial confirmed that dispatchers try to match containers with empties to promote maximum efficiency, (Tr. 1535-36, 2145-58, 3326-30, 2151-53, 2760-61, 3451, 4127-28), and that this efficiency is in IBT's financial interest. (Tr. 3384-85). Further, any significance attributable to alleged "choices" is tempered by the facts that sometimes there is no discernible differences between the loads offered, so drivers will guess as to which assignment they should take, (Tr. 1612-14, 3056). Plus, even the undisputed employee drivers that IBT obtained from Staffmark were sometimes given choices by IBT's dispatchers. (Tr. 3935-36, 3117-18).

Another example of the dispatcher's control over what assignments go to drivers is seen in IBT treating its drivers as employees by trying to spread available work evenly among its drivers. (Tr. 1652-54). This proportioning of assignments involves dispatchers rotating the most desirable assignment among all drivers (Tr. 2428-30, 2922-23, 3215-18, 1209-10, 3634-39), and saving empties for future drivers rather than giving more than one empty to a driver who requests it. (U. Exh. 44). In fact, before drivers began to engage in protected concerted activity, dispatch would give preference to drivers who, the day before, had received little or no work. (Tr. 1457, 2177-82, 2795-97). Again, these actions more closely resemble how an employer interacts with its employees than it resembles two truly independent businesses contracting with each other.

It is also clear that, were all drivers really able to refuse assignments without repercussion, IBT would be unable to function as a motor carrier.[55] Thus, there is a need for IBT to directly or indirectly constrain drivers in their alleged choices of assignments. That is why dispatchers examine the work available for the day, coordinate containers and appointment times with terminals and customers so that they know how to best dispatch drivers, and dispatch drivers in order to comply with any requests from IBT's customers. (Tr. 3279-80, 3995-97, 4023-24). Drivers play no role in setting these appointments, cannot communicate with customers or the Port to change them, and must provide a reason for dispatch to communicate to customers if they miss an appointment. (Tr. 487-90; 4129-30; 172-74; 256-57; 939-41, 3729; 3325-26; 2054-58, 3336-38; 487-90; 1180-81;

[55] IBT's claim that it is a "common practice" for drivers to "simply go[] home rather than completing the accepted load" is spurious. Resp. Brf. 28. Such a practice would be unworkable and would lead to IBT not completing the work it has accepted from its customers. Driver testimony cited by IBT does not support the conclusion that this was a "common practice"—if anything, it appears to be limited to extraordinary circumstances. Ramirez at first states he does not go home while he has loads to be delivered, and then clarified that he would only do it when there is a family issue that he has to address—a family emergency. (Tr. 3014). Pham states that he has only ever returned loads after accepting them a "couple times" and that he "will try to do [his] best to complete" a load once he accepts it. (Tr. 3060-61). Quintero stated that he does not normally reject loads, and the only example he gave for rejecting a load is when there are no chassis available—in other words, when he does not have access to the equipment necessary to actually complete that load. (Tr. 1175-76). The only situation where Granados gives loads back to IBT is when he is stuck for too long at a Port, and he admits he typically asks the dispatchers whether or not he can leave the load. (Tr. 2896-98).

1407-08; 672-74, 3291-92). In other words, a dispatcher's job is to move as many containers possible during a shift (Tr. 2732-33), and dispatchers choose what to offer drivers in order to meet that goal. On the rare occasion that a driver actually rejects an assignment, the most common reason is congestion that would slow down the driver and would result in fewer containers being moved—it is not coincidental that in those scenarios, even IBT would benefit by having the driver reject the assignment until that congestion is eliminated. (Tr. 3011-12, 3164-65, 3285, 3298, 2924).

(f) Drivers Do Not Have Realistic Ability to Structure Their Workday

Despite IBT's claims, testimony from drivers at the hearing made clear that the vast majority of the time, IBT only gives drivers one movement at a time, and they must regularly communicate with dispatch to get information about the containers they are moving and to receive new assignments. (Tr. 165, 667, 1004-09, 2146, 2151-54, 3332; 4157). In some instances, drivers are communicating with dispatch five to eight times a day. (Tr. 4157-58). These are indicators of employee status. Like the statutory employees in *Time Auto*, 338 NLRB at 637, IBT's drivers "only received their next assignment after they dropped off their current load." This allows IBT coordinate loads and dictate what order drivers will do assignments in—instead of allowing drivers to make those decisions by taking all their work for the day at once.

Further, the fact that IBT's drivers can choose the specific route they take to deliver a container does not support a finding of independent contractor status. This choice of route is "mainly or wholly dictated by the location of customers who need delivery that day and the amounts they need. Such 'decisions' are made every day by deliverymen whose employment status is never questioned and involve little if any independent judgment." *FedEx*, 361 NLRB No. 55, slip op. at 13. *See also*, *Standard Oil Co.*, 230 NLRB 967, 972 (1977) (finding drivers' control over minor job details such as route and timing of deliveries are "hardly significant indicators of entrepreneurial activity or controlling means of performance."); *Roadway*, 326 NLRB at 844

(finding employee status based on overall factors despite fact that drivers choose what route to take).

(g) IBT Controls the Vehicles It Leases to Its Drivers

The driver's complete lack of control over the vehicle that they use to complete IBT's work is another factor supporting a finding of employee status. Because of how IBT decided to rent the trucks to drivers on a daily basis, IBT drivers do not have a specific truck that they use every day—they are given whatever truck IBT has available when they show up to work. By itself obtaining the trucks that its lease drivers use, IBT took sole responsibility for selecting the vehicles' specifications, and then registered the trucks in its name. IBT obtains fleet insurance for all its vehicles, and no driver has ever purchased their own insurance for the truck they use to work at IBT. Drivers are only allowed access to the truck during their eleven hour shift, and must then return the truck to the yard so that a driver from a different shift can use the truck. IBT completes and controls required maintenance and repair for the vehicles it gives drives, (Tr. 3264; 151; 653-56; 3845-46; 1678-80), and even insulates drivers from economic loss by ensuring that drivers have a working truck to use if some of IBT's trucks are being repaired. Finally, IBT took it upon itself to have GPS devices installed in these trucks and, after drivers were already using the trucks, even decided to modify all the trucks to limit the speed at which drivers could travel. Thus, IBT's unequivocal control over the vehicles used to complete its deliveries supports employee status.

8. Drivers Do Not, In Fact, Render Services as Independent Businesses

Respondent advocates a focus on entrepreneurial opportunity without acknowledging the Board's rejection of such focus and clarification that entrepreneurial opportunity is merely a portion of a factor examining whether the individual in question is, in fact, "rendering services as part of an independent business." *FedEx*, supra. Thus, it is not adequate to isolate a few pieces of the relationship and claim that the entrepreneurial opportunity stemming from those components

converts employees into independent contractors. Instead, this factors looks at the actuality of the relationship, focusing on: (1) whether the putative contractor has a significant entrepreneurial opportunity, (2) whether the putative contractor has a realistic ability to work for other companies, (3) whether the putative contractor has proprietary or ownership interest in her work, and (4) whether the putative contractor has control over important business decisions. *Id.* The Board also clarified that it would consider the extent to which the putative employer "has effectively imposed constraints on an individual's ability to render services as part of an independent business," *Id.*, slip op. at 12, and that "if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees." *Id.* slip op. at 11.

This factor demonstrates that IBT drivers in no way operate as an independent businesses. They do not own their own trucks and are not leasing to own. They do not have their own operating authority. They do not have registered trucking businesses[56], and none of them advertise their services as drayage providers. They drivers provide services exclusively to IBT, following IBT's policies and procedures. They do not communicate with IBT's customers directly and are compensated only by IBT for their work. Their only real opportunity to earn more money is to work harder and faster—the same opportunity that employees across the country have.

(a) Drivers Do Not Have Real Entrepreneurial Opportunity

IBT's drivers do not have any opportunities to behave like true entrepreneurs, increasing earnings by adroit management of their independent business. Instead, the only real control drivers have is over their own labor: how often they provide that labor and how quickly they provide that

[56] While Cabral did have a registered business for his pervious brokerage work, this business was not registered as a motor carrier. Additionally, that entity has been listed as suspended by the Franchise Tax Board. Cabral also clarified that his company and IBT do not do the same sort of work. (Tr. 3224).

labor. Thus, "unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices or to be able to take financial risks in order to increase profits." *Standard Oil*, 230 NLRB at 972. Instead, drivers work within narrow constraints imposed by IBT and the only way they can increase their income is by doing the same thing piece-rate employees can do—work faster, work harder, or get a second job. None of these indicate entrepreneurial opportunity because true entrepreneurial opportunity involves taking entrepreneurial risk and being able to reap a profit by "working smarter, not just harder." *St. Joseph Press*, 345 NLRB 474, 479 (2005).

As described above, IBT has effectively constrained most of the drivers' opportunities to act smarter at work. By assigning drivers to a specific shift and starting dispatch at specific times within those shifts, IBT is limiting a drivers ability to make decisions about when to work. Any miniscule increase in a drivers' income that results from working harder or longer is nonetheless consistent with an employee-employer relationship—a function of the piece-rate system instituted by IBT, which pays drivers on a per-load basis and requires driver to completed their assigned movement before receiving another.

IBT also constrains drivers' ability to work smarter by picking and choosing to only accept the most profitable work. The record demonstrates that before April 2015, drivers did not have the ability to choose or reject assignments—IBT thus engaged in its much derided "forced dispatch" before this date and any attempts by drivers to reject assignments would lead to retaliation (which is not surprising since a dispatchers' job depends on moving as many containers during their shift as possible, and a driver rejecting an assignment would necessarily interfere with that goal). Even assuming the dispatchers have offered limited choices to drivers since 2015, these choices are dependent on a dispatchers' discretion. Dispatchers must consider efficiency and make choices about what to offer drivers, and do not offer drivers every single available assignment. IBT even

admitted to rotating one of its most profitable assignments between drivers, meaning that one driver would not be given this assignment consecutively even if he wanted it and was able to complete it.

While drivers may have a limited choice about what specific route to take from Point A to Point B, this choice is miniscule and entrepreneurially insignificant. Especially considering that IBT has structured its dispatch to—the vast majority of the time—only give drivers one movement at a time, limiting a drivers' ability to structure his own work day—instead, they follow dispatchers instructions from Point A, to Point B, to Point C, until there is no more work.

Respondent points to other areas it considers strong indicators of a drivers' entrepreneurial opportunity: swapping loads, staging empties or containers at the IBT yard, moving Sony empties, and doing dock moves at Elkay. Rather than constituting true entrepreneurial opportunity, however, each of these examples are merely an extension of IBT's operating model over which IBT exercises authority, and they are often so infrequent as to be insignificant.

Dock moves refers to when a container has to be moved inside of a customer's yard, typically because space needs to be made for a new container that is coming in. Day-shift drivers testified that one of IBT's customers, Elkay Plastics, would occasionally request that drivers complete a dock move to make space for the container they delivered.[57] Although drivers earn $15 from IBT for completing the dock move, this is not entrepreneurial opportunity. It is just a part of IBT's agreement with its customers and part of IBT's normal business. Drivers do not go to Elkay just to complete dock moves—they only go to Elkay when they are otherwise delivering a container there, and dock moves are fairly infrequent. (Tr. 1139-40, 1193-94, 1267, 3224-26, 341-45, 615-16, 738-39, 860-62, 882-84, 982-84, 2975-76, 888-89).

[57] Night shift drivers do not complete these type of dock moves. (Tr. 1530, 1457).

Drivers are not paid by Elkay—they include the dock move on their IBT manifest and are paid by IBT. They do not go to other non-IBT customers to do these types of dock moves. Drivers did not negotiate the $15 rate either with IBT or with Elkay. Thus, IBT must have come to some arrangement whereby IBT agreed to have its drivers do these dock moves when they were taking a container to Elkay. The only driver to testify that he had refused to do a dock move was Cabral, and he made it clear that he only said no because he would otherwise have gone over his federally mandated hours of service. Thus, this is not true entrepreneurial opportunity—it is merely a part of IBT's business. IBT has decided to allow drivers to do this work and compensate them for it.

IBT similarly exercises control over Sony empties. Sony is one of IBT's biggest customers and, as of hearing, IBT was Sony's only trucking provider. This meant that every empty container in Sony's yard belonged to IBT, and IBT was responsible for returning those containers to the Port, risking fines for itself or Sony if it failed to do so. (Tr. 2247-50). Respondent claims drivers would regularly go to the Sony yard of their own volition. (Resp. Brf. 35). This misstates the truth. Drivers are not, in fact, given free rein to retrieve containers. To begin with, if IBT needs these empties moved, it has no compunction with instructing drivers to find empties and call the dispatcher once they do. (Tr. 1529-30; 2891-93). The dispatcher then has to authorize the driver to actually return the empty to its final location. The IBT driver cannot do it without contacting the dispatcher and obtaining the authorization. (Tr. 3293-94; 292-93; 3531-32; 3257-58; 3174-75; 1264-66; 2802-04; 2925; 4160-61).

The control exercised by IBT over retrieval of empties from Sony is illustrated by the testimony of Dispatcher Moreno, who testified that drivers should not actually be going to Sony on their own because, "can you imagine if you have all drivers going and picking up empties out of any customer just cause they feel like it and there's hardly, there's no – there's no logic to it." (Tr. 3367-68). Zea actually considers drivers going to Sony before being dispatched with their other

assignments "cheating," so IBT decided to prevent drivers from engaging in his conduct by not giving them their keys until they had already received their first dispatch. (Tr. 2143-45). It is hardly surprising that some drivers testified that they never go to Sony on their own unless they ask a dispatcher or are instructed to go. (Tr.1181-85; 87-90; 1140-42; 1607; 803-04; 1025-26).

Respondent also points to drivers' alleged ability to stage containers or empties as a grand indication of entrepreneurial opportunity because it allows drivers some ability to structure their day. This misstates the truth as any alleged ability to stage containers is completely at IBT's discretion and therefore not true entrepreneurial opportunity. Drivers testified that they need permission in order to stage either empties or loads in the IBT yard during their shift, or empties overnight (IBT does not allow loaded containers to be left at its yard overnight). (Tr. 1662-64, 1561-45). One driver in particular was aggressively instructed not to leave loads in the IBT yard overnight, even if he is running out of hours, and told that he must complete the loads he receives during his shift. (Tr. 1517-19, 1573-75). In fact, Zea at one point emailed all his dispatchers instructing them to force drivers to complete their empties instead of leaving them in the yard. (Tr. 2415-17, U. Exh. 40). To ensure that drivers complied, IBT began assigning empty containers left in the yard too long to other drivers and charging the drivers who initially left it in the yard—not something that would occur unless IBT controlled the containers, their staging, and their dispatching. (Tr. 1641-45; 2244-47).

Respondent's least supported claim is that drivers regularly swap loads—the record makes it more likely than not that drivers are not actually allowed to swap loads and this claim is part of IBT manufacturing positive evidence. Operations Manager Kirkbride admitted to specifically instructing drivers that they are not allowed to switch assignments with each other. (Tr. 4160). Respondent only presented a single witness who testified about receiving a load from another driver a few days

before.[58] Although initially claiming this was a common practice, he was only able to name two other drivers he has ever switched loads with and stated it would have only been a couple times with each of those drivers (without being able to give specifics). (Tr. 2878-82, 2913-14, 2919-20). It is also suspicious that IBT introduced a document and had a dispatcher testify that two of the GC's witnesses had recently attempted to swap a load, yet it did not question either of those witnesses about their alleged attempts to swap. (Tr. 3548-50). Thus, the Board should reject the contention that drivers freely swap loads and that this is an indication of entrepreneurial opportunity.

Respondent also argues that drivers controlled their pay by negotiating their pay rates or the amount they paid for their daily lease. (Resp. Brf. 38-41). Based on his observations at hearing, the testimony, and the documentary evidence, the ALJ summarily rejected this argument and found that IBT had perpetrated "'sham' negotiations the purpose of which was simply to make it appear that drivers had some ability to negotiate rates when in reality they did not." (ALJD 10). Despite IBT's claims about arms-length negotiations, these "negotiations" could more fairly be characterized as unilateral wage increases which:

> were orchestrated by IBT with awareness of the potential for litigation for the purpose of creating the mere impression that IBT did not maintain strict control of the rates of compensation. In reality, the rate increase appeared to be a single effort of across the board rate increases in which the rates increases were the same for all employees and even employees who did not "negotiate" were given rate increases. Contrary to Respondent's contentions the facts surrounding the rate increases further supports the conclusion that IBT exercises strict control over driver compensation and thus weighs in favor of employee status.

ALJD 16, fn. 10. Further, "IBT unilaterally sets wait time rates and drivers do not negotiate the specific rates they are paid for waiting time. (Tr. 506–508, 869, 3096–3097.)," (ALJD 10), and "IBT requires every driver to pay $60 for each day they use the truck . . . except on Saturdays when

[58] The fact that IBT did not present the driver who had allegedly given him the load is suspicious. Based on IBT's proven propensity to color the record and manufacture evidence, it would not be surprising if IBT instructed that other driver to "give" a load to Granados for the sole purpose of having Granados testify.

the lease rate is $20. IBT in its *discretion* may reduce the daily rate if the driver's work assignments are not enough to cover the regular lease payment. (GC Exh. 128.)" (ALJD 6) (emphasis added). Thus, drivers did not actually have any ability to negotiate.

Finally, as extensively described above, IBT's drivers do not operate as separate businesses and are dependent on IBT for every tool and instrumentality that would be necessary for them to take on work independently. By virtue of all these facts, it is apparent that the only opportunity IBT's drivers have to affect their income is to work harder or faster. And the Board has made clear that "[t]he choice to work more hours or faster does not turn an employee into an independent contractor. To find otherwise would suggest that employees who volunteer for overtime, employees who speed their work in order to benefit from piece-rate wages, and longshoremen who more regularly appear at the 'shape up' on the docks would be independent contractors. We reject that notion." *Lancaster Symphony,* 357 NLRB at 1765.

(b) Drivers Do Not Have a Realistic Ability to Work for Oher Companies

The fact that IBT's drivers do not have a realistic ability to work for other companies is most clearly demonstrated by the fact that none of IBT's drivers have ever worked for another trucking company while working for IBT. After all, as the Board stated in *FedEx*, slip op. at 11, "if the day-to-day work of most individuals in the unit does not have an entrepreneurial dimension, the mere fact that their contract with the employer would permit activity that might be deemed entrepreneurial is not sufficient to deny them classification as statutory employees." It is also irrelevant to this inquiry whether drivers could have obtained a second job done completely outside of IBT's ambit—the Board recognized in *Sisters Camelot*, slip op. at 5, that the fact "that the [individuals] may and often do work for other employers when they are not actively working for the Respondent is essentially indicative of their part-time work schedule and has little bearing on whether [the individuals] are employees or independent contractors."

It is also highly relevant that some of the reason why drivers do not actually work for other companies is that IBT has effectively created obstacles through its relationship with its drivers. *see Roadway*, 326 NLRB at 851. IBT only rents its trucks to drivers for 11 hours at a time and requires that drivers use its insurance. This means that even if drivers wanted to keep the truck out all day to use it to work for multiple companies at the most profitable times of day, they would not be able to do so. Drivers would also not be able to hire a second person to operate that truck with another employer because IBT compels all driver to check the box on their weekly lease indicating that they will not hire anyone else to operate the truck they are leasing by showing them a dummy copy with that box checked and by telling drivers that they have to check "no"—and no driver has ever checked the box indicating he would hire another driver. (Tr. 406, 907-13, 1069-70,1371-76,1317-18, 1784-85; 3464-71; 3433-35). Bradley even suggested that the only way a driver would be able to hire someone else is if the driver leased two trucks—and no driver has ever leased two trucks from IBT at the same time. (Tr. 1784-85). Finally, their lack of truck ownership or operating authority constrains drivers' ability to work for other companies.

(c) Drivers Have No Proprietary or Ownership Interest in Their Work

In this case, drivers do not have even a theoretical proprietary interest in the work they perform. Unlike in *FedEx*, supra, where drivers had a theoretical opportunity to profit from selling off their route to a different driver, IBT's Lease Drivers do not have proprietary routes, nor service areas that belong exclusively to them, nor specific customers that they have an exclusive right to service. IBT's Lease Drivers just accept whatever assignments the dispatchers give them, and deliver to all of IBT's customers interchangeably. In fact, IBT's lease drivers do not even have a proprietary or ownership interest in the truck they use while at IBT. Therefore, drivers do not have any proprietary or ownership interest in the work that they perform.

(d) Drivers Have No Control Over Important Business Decisions

Drivers do not have any say in important business decisions during the course of their work. In *FedEx*, slip op. at 15, the Board held that the drivers had no control over business decisions because FedEx had "total command over its business strategy, customer base and recruitment, and the prices charged to customers." This general inability to set customer rates has been cited by the Board as indicia of employee status. *see Corp. Express Delivery*, 332 NLRB 1522 (2000).

Here, IBT maintains "total command over its business strategy, customer base and recruitment, and the prices charged to customers." *FedEx*, supra, slip op. at 15. Zea and Ackerman are primarily responsible for finding customers, and for negotiating the terms under which IBT provides those services—including the price paid by those customers. Drivers are not involved in any aspect of that. No driver testified that he regularly finds customers for IBT, and no driver testified that he has ever negotiated the prices that IBT's customers will pay. Drivers also do not suggest improvements for how IBT can service its customers. IBT offered no evidence that drivers are involved in any of these decisions or interactions. In fact, drivers' only interaction with IBT's customers happens at the point when drivers drop off or pick up a container at the customer's yard, as representatives of IBT. Drivers are not allowed to individually address issues that arise with customers—they are supposed to instead call dispatch, who will then address those issues.

IBT's Lease Drivers have also not been involved in developing IBT's own business strategy. IBT unilaterally made a decision to obtain trucks, and to switch from drivers who owned their own trucks to Staffmark drivers once the Clean Truck Program began. IBT then unilaterally decided that it was too expensive to get drivers from Staffmark, and made the decision to begin leasing those trucks to drivers on a day-to-day basis. There is no evidence that IBT's drivers have taken any role in these decisions—nor in the day to day decisions that must be made in order for IBT to continue running, such as the hiring of personnel. No driver testified that they had ever been consulted about

what size IBT's fleet of drivers should be or about who should be brought on board in order to dispatch IBT's drivers. In fact, drivers' complaints about unfair dispatchers fell on deaf ears. Thus, IBT controls important business decisions and drivers are not involved in those decisions.

9. Level of Skill Required Supports Employee Finding

It is undisputed that driving a commercial truck is an arduous job and difficult job. This factor, however, continues to support a finding of employee status because the same level of skill is required for undisputed employee drivers in the drayage industry as it is for IBT's drivers, and because IBT takes it upon itself to train individuals who do not have the necessary level of skills.

Respondent makes much of the fact that drivers attend trucking school in order to obtain their commercial driver's licenses, pointing out that sometimes it is for up to six months. (Resp. Brf. 50). This, however, ignores the fact that these are not full time programs and that the actual instruction time is miniscule for the drivers who testified. (Tr. 418-19 (18 to 20 hours over three month period); 695-96 (24 hours over one month); 1461-62 (two hours a week for six months); 1478 (one or two days a week for six months)). In other words, this is not a profession which requires hundreds or thousands of hours of instruction over months or years—it appears that most any person can pick up the required skills within 20 or 30 hours.

Respondent similarly makes much of the fact that drivers have to "learn to conduct pre-trip inspections, DOT requirements . . . and all things necessary to obtain a commercial driver's license . . . submit to a medical examination . . . [and be] knowledgeable and skilled in 20 general areas." (Resp. Brf. 50). Respondent, however, fails to address the fact that employee drivers across the trucking industry also have to obtain a commercial driving license—typically by going to school—

and that they also have to submit to all those DOT requirements and be knowledgeable in the identified areas. This includes the very employee drivers that IBT employed trough Staffmark.[59]

Another indication that the skill level factor weighs on the side of employee status is that when IBT is presented with a driver who does not have the required skills, IBT will provide that training to the driver. *See Sisters Camelot*, supra, slip op. at 3; *see also United Insurance Co.*, 390 U.S. at 258–259 (agents lacked prior experience and were trained by company personnel, which supported employee status). When drivers have less than one year experience, IBT itself provides an Entry-Level Driver training and affirm that the driver has completed that training, instead of allowing drivers to do so on their own. Thus, IBT acted like an employer wanting to develop its workforce and to ensure that its employees have the necessary skills to accomplish its goals. Although this training is short, it is similar to the FedEx drivers who "receive[d] all necessary skills via 2 weeks of training provided by FedEx." *FedEx*, supra, slip. op. at 13. As the ALJ notes, it is also significant that any special skills that are required "are integral to IBT's ability to accomplish its core mission, which tends to show that they are employees, rather than independent contractors providing services on an intermitted basis." (ALJD 15). In other words, drivers did not obtain commercial licenses and special skills in order to further any enterprise or business of their own—they obtained these skills only in order to obtain and retain a job with an employer, and they have utilized these skills exclusively for IBT's benefit for years on end.

Finally, it is worth pointing out Respondent's hypocrisy that becomes apparent in this section. IBT urges the Board not to give any weight to the Entry-Level driver training that it administered because "it would be improper to extrapolate the issue to anyone other than the single

[59] Judge Wedekind also found that "company drivers," who were already uncontested employees in that case, "also had a Class A CDL, and some likewise had special endorsements." Yet, this factor did not support independent contractor status because those skills "were no different than the company drivers' skills." *Green Fleet Sys*, 2015 WL 1619964.

individual" who received the training. (ALJD 53). To begin, this statement is particularly amusing considering that on nearly every other page of its brief, Respondent urges the Board to rely on the testimony of David Cabral—testimony that only he gave and that was contradicted by other driver witnesses and even by IBT's own witnesses. Putting aside Respondents' hypocrisy, Respondent is just mistaken. It is proper to give weight to the Entry-Level driver test because that is the only example we have of someone with less than one year experience showing up at IBT's facility and, the only time that it occurred, IBT provided that driver with the necessary training. The obvious takeaway is that IBT would have provided that training to anyone who walked in the door. With regards to Cabral, there was testimony from other drivers that contradicted Cabral, and Cabral was the *only* driver to claim he was allowed certain leeway by the employer. Thus, it would be improper to rely on Cabral's testimony even though it is proper to consider the fact that IBT provides certain training to its drivers, even if just one driver received that training.

For these reasons, although commercial trucking is not an easy job, the level of skill required supports a finding of employee status.

10. Parties' Belief Supports a Finding of Employee Status

Respondents' argument that drivers were aware that they were entering an independent contractor relationship falls flat because it is plagued by the same error as much of its exceptions brief—it focuses on out of context rote indicia of employee status, and centers drivers' beliefs squarely on those out of context indicia. It is also a circular argument. For example, IBT argues that Granados believes he is an independent contractor because "if he was an employee, he would have a specific schedule for arriving an leaving, and to get a break, days off, or vacation." (ALJD 65). This belief is mistaken because employers always have the power to give employees discretion in many aspects of their employment without losing their employee status.

Because of that mistaken understanding, it is necessary to look at other indicators about the drivers' and IBT's true belief. The ALJ properly starts off by discounting the references to "independent contractors" in the agreements IBT requires drivers to sign because, as described above, all of this documentary evidence is unreliable and IBT has explicitly attempted to manufacture portions of this documentary record to mislead the Board and bolster its weak argument that its drivers are independent contractors. *See FedEx,* supra, slip op at 14 (discounting use of the term independent contractor from driver agreements because drivers were not able to negotiate over the use of that term).

Thus, IBT's dishonest actions demonstrate that it was aware from the beginning that its drivers were not really independent contractors, and therefore could not have intended to enter into an independent contractor relationship. In particular, IBT's presentation of take-it-or-leave-it agreements and its subsequent demand that drivers backdate certain employment documents demonstrates both an exercise of control incompatible with independent contractor status, and a realization that it needed to taint the record to hide the truth of the relationship with its drivers. If IBT truly believed its drivers were independent contractors, it would have been content leaving the available evidence as is under the belief it would be vindicated by this tribunal.

When coupled with the actions taken by drivers to demonstrate their belief that they are employees, this factor must support a finding of employee status. In particular, several of the GC's witnesses affirmatively testified that they believe themselves to be employees (Tr. 464, 556-57, 560-61, 967, 1153-55, 1450, 1620-21). Further, the majority of IBT's drivers signed a petition affirming their status as "employees working as drivers." (GC. Exh 2, 3). Finally, drivers have filed wage and hour claims with the California Department of Labor Standards and Enforcement, and at least 54 drivers have joined a class action lawsuit against IBT alleging that they are really employees under wage and hour laws. (U. Exh. 9-11, 17-18, 51-53). There can be no greater

indication of a belief in employee status than taking collective and legal action to assert that status as an employee, and most of IBT's drivers have now taken this step. Thus, this factor strongly supports a finding of employee status.

11. Conclusion on Employee Status

Despite IBT's extensive efforts to mask and obfuscate the truth of its working relationship with its drivers, all that IBT has proven is that it uses a fleet of drivers who work exclusively for IBT and who are completely dependent on IBT. IBT has significant control over these drivers and the means and manner of their work. Although drivers have some leeway throughout their workday, the extent of IBT's control over significant aspects of how drivers perform their work and the compensation they receive for doing so demonstrates that drivers do not exercise the level of freedom and independence that is required to exclude an individual from statutory protections. This would be true even under Respondent's mistaken formulation of the test for employee status. The only real opportunity drivers have to change their pay rates is to work more or less hours, and to work faster or slower—the same opportunities countless employees have. No driver testified about working for other companies or otherwise having real entrepreneurial opportunity. Accordingly, abundant record evidence supports ALJ Montemayor's well-founded determination that "the factors set forth in Fed Ex overwhelmingly support that the [IBT] drivers were employees, and thus entitled to the Act's protection," and the Board should uphold this determination.[60]

[60] As Judge Montemayor noted, this conclusion is consistent with the decisions of the California Department of Labor Standards Enforcement (DLSE) finding that similarly situated drivers of IBT were in fact employees . Naranjo, Townsel and Siveyra v. Intermodal Bridge Transport Case Nos. 05-62622' 05-62704KR; and 05-664459 KR (2017) (*See* ALJD 16, fn 11; and 17, fn. 12) While determinations by state agencies are not determinative under Board policy, the Board has recognized that they have "probative weight" and should be considered in Board proceedings. *Synatron/Bondo Corp*., 324 NLRB 572, 587, fn.54 (1997); *Cardiovascular Consultants of Nevada* 323 NLRB 67 fn.2 (1977) While this determination was made under the California Labor Code, the DLSE relies on the common law agency test as the basis for its employee status analysis. *See Borello & Sons v. Dept. of Industrial Relations*, 48 Cal. 3d 34 (1989).

C. ALJ Properly Found that Misclassification Is A Violation of Section 8(a)(1)

Judge Montemayor found that the act of misclassifying employees as independent contractors violates section 8(a)(1) because "misclassification not only serves to chill future concerted activity . . . but essentially deprives and conceals available protections these employees have under the Act. Interference and restraint of Section 7 rights flows directly from misclassification." (ALJD 20). Contrary to Respondent's contention, lack of precedent directly on point is not reason to reject this theory when the text of the Act and caselaw support a violation.[61] In fact, the argument that workers should be allowed to organize unions at all was once considered a "novel" idea now enshrined in §7 of the Act.[62] With the surge of misclassification in the contemporary workplace, this issue comes now before the Board. For the reasons set forth below, the Board should reject Respondent's exceptions and affirm that misclassification violates the Act.[63]

1. Text of the Act and Board Law Support Finding that Misclassification Violates Section 8(a)(1)

Support for finding misclassification to be a violation arises directly from the text of the Act and caselaw on analogous issues.[64] Section 8(a)(1) makes it unlawful for an Employer "to interfere with, restrain, or coerce *employees* in the exercise of" their Section 7 rights. 29 USC § 158(a)(1) (emphasis added). Similarly, Section 7 provides that "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of

---

[61] Every legal principle has a beginning point. See**,** *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (holding a hostile work environment violates Title VII and citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) as the "first case to recognize a cause of action based upon a discriminatory work environment.")

[62] See, 1, J. Higgins, Jr. et al., *The Developing Labor Law*, pp. 1-1 to 2-10 (7th ed., 2017).

[63] As Respondent has persisted to misclassify drivers and require them to sign independent contractor agreements, it has engaged in classic continuing violations that are not restricted by10(b). See, e.g. *Kmart Corporation* 363 NLRB No. 66 (2015).

[64] Despite Respondents focus on it, it is irrelevant that the General Counsel has withdrawn the memorandum in *Pacific 9 Transportation* because that memorandum did not form the basis of this violation.

collective bargaining or other mutual aid or protection . . . ." *Id.* at § 157 (emphasis added). Thus, the Act itself limits its protections to employees, excluding from the definition of employee "any individual having the status of an independent contractor." 29 USC § 152(3).

This binary divide between the rights afforded to an employee and denied to an independent contractor under the Act demonstrates the coercive effect of misclassification. Employers who misclassify employees as independent contractors effectively conceal Section 7 rights and convey to their workforce that they have no rights to organize or engage in activities for mutual aid and protection. It is difficult to imagine a clearer violation of Section 8(a)(1).[65]

In *OS Transport*, 358 NLRB at 1053-54, the employer compelled its employee drivers to individually incorporate and sign independent contractor agreements, insisting even after drivers filed an RC petition with the Teamsters. The Board and the ALJ agreed that this forced incorporation was a sham and found that the employer violated Section 8(a)(1) when it told drivers that "if they were thinking about getting help from a union that it would not be possible because they were going to be the owners of their own companies." *Id.* Although the Employer in *Os Transport* vocalized the threat of futility, this same threat is conveyed by misclassification without vocalization as drivers, believing they have no rights, will refrain from seeking Union help.

In *First Legal*, 342 NLRB 350 (2004), the employer, as a condition of continued employment and in response to learning about an organizing campaign, required employees to sign agreements labeling them independent contractors. The Board and ALJ agreed that this reclassification violated Sections 8(a)(1) and (3), reasoning that the workers:

> Instead of being employees, enjoying Section 7 rights, they found themselves treated as if they were nonemployees without any rights whatsoever. Not only did they lose their Section 7 rights, they also lost state protections such as unemployment

[65] *See Velox Express*, 15-CA-184006, 2017 WL 4278501, slip op. at 1 (September 25, 2017) (""By misclassifying its drivers, Velox restrained and interfered with their ability to engage in protected activity by effectively telling them that they are not protected by Section 7 and thus could be disciplined or discharged for trying to form, join or assist a union or act together with other employees for their benefit and protection.")

> insurance, workmen's compensation insurance, the right to complain to the State Labor Commissioner concerning wage matters and the like. This was no slight adjustment in position; it was a fundamental change of status.

342 NLRB at 362. This reasoning supports finding an independent 8(a)(1) violation because the act of misclassification has the exact adverse result disapproved by the Board in *First Legal*, regardless of whether the employer imposed the misclassification in response to protected activity—IBT's drivers also "found themselves treated as if they were nonemployees without any rights whatsoever." *Id.*

There can be no greater interference with the exercise of rights than someone asserting you do not have those rights—no matter their motivation. Moreover, the motivation of an employer committing an 8(a)(1) violation is of no moment. As the Board established long ago in cases like *Am. Freightways Co.*, 124 NLRB 146, 147 (1959), "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Here, there is no question that IBT's misclassification tends to interfere with the exercise of employees' rights in the same way that the conduct in *Os Transport* and *First Legal* did, regardless of the Employer's intent.

In addition, the ALJ found an independent violation of Section 8(a)(1) by analogizing these independent contractor agreements with the infamous "yellow dog contracts" which prohibited unionization,[66] finding that:

> Instead of forcing the employee to affirmatively forswear unionization, the [independent contractor] agreements simply redefined these employees as something other than employees—independent contractors who by definition cannot enjoy the protection of the Act. The result was the same, employees were prohibited by agreement from engaging in union organizing activity. They were forced to relinquish the rights guaranteed them by §7 of the Act.

[66] The Board did not opine on this finding because no exceptions to it were filed.

342 NLRB at 363. This finding is directly applicable to the independent contractor agreements that IBT required its drivers to sign—both when they first began, and when IBT unilaterally redrafted those agreements to conceal drivers' misclassification.[67] Contracts that misclassify employees effectively cede their statutory rights, and are violative of the Act.[68]

The requirement that drivers sign independent contractor agreements labeling them independent contractors also violates Section 8(a)(1) under the Boards approach to determining whether maintaining certain work rules violates the Act. In *Boeing Company*, 365 NLRB No. 154 (2017), the Board adopted a stricter standard balancing: (1) the impact a work rule maintained by an employer has on NLRA rights, and (2) the legitimate justifications associated with the rule.

Because misclassification eviscerates Section 7 rights for misclassified employees, it falls under Category 3—in every instance, such a rule violates the Act because it will "prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." *Id.* slip op. at 4. IBT's requirement also violate the Act if analyzed under Category 2 because the impact on Section 7 rights outweighs any claimed legitimate interest from maintaining the work rule. *see id.* Here, the record makes clear that IBT did not have a legitimate reason for maintaining this rule.

When drivers began engaging in protected concerted activity, IBT did not merely stand by its classification and assert that it had correctly classified its drivers. Rather, IBT went out of its way

---

[67] *See also*, *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (holding that "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.") (quoting *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940)).

[68] Respondent makes the argument that misclassification should not be a violation because the allegedly misclassified drivers in this case *have engaged in protected activity.* This fundamentally misunderstands the chilling effect of misclassification. Just because some employees were brave enough to step up to assert their rights and challenge their misclassification does not detract from the fact that, undoubtedly, some employees will look at that label and refrain from asserting any rights because the Employer has communicated that they do not have rights. That interference with Section 7 rights is what causes misclassification to be a violation, and that chilling effect is not tempered by the fact that some employees did engage in protected activity.

to "attempt[] to manufacture a record that would color the facts in its favor," (ALJD 10). It forced drivers to backdate revised versions of old documents and then destroyed the originals; it unilaterally re-drafting agreements with drivers even though there was no concurrent change in business operations; and it set up "'sham' negotiations, the purpose of which was simply to make it appear that drivers had some ability to negotiate rates when in reality they did not." (ALJD 10). The only logical inference is that IBT acted to disguise its misclassification, which is not a legitimate justification for continuing to maintain a rule requiring that drivers sign independent contractor agreements. In addition, Respondent's general animus towards the Union also reinforces the conclusion that IBT had an illegitimate reason to continue classifying its driver as independent contractors. (*see* GC Exh. 126-37, U. Exh. 38, U. Exh. 37). Thus, under both Category 3 and Category 2 of the new *Boeing Company* work-rule standard, IBT's work rule requiring that drivers sign take-it-or-leave-it agreements placing them outside the Act, violated Section 8(a)(1).

2. Finding Misclassification to Be a Violation Does Not Impermissibly Shift the Burden of Proof

Respondent argues both that finding misclassification to be a violation would impermissibly shift the burden of proving a violation away from the General Counsel, and that the Board should also reject its long-standing rule that the burden of excluding a party from the protections of the Act rests on the party seeking such exclusion. Neither of these arguments are supported by either the Board or the Supreme Court's caselaw. As misclassification is such a fundamental violation of the Act, it would be proper for the Board to find that an employer's failure to carry the burden of showing that a worker should be excluded from the Act as an independent contractor is sufficient to establish a prima facie case of interference based on that misclassification.

While it is true, typically, that the GC has the burden of showing that a violation occurred, the Board has found it proper to place the burden of excluding individuals from the Act on the party

seeking such exclusion.[69] The Board did not make this decision in a vacuum. The Supreme Court has long recognized that a "general rule of statutory construction [is that] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefit." *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (citing *Javierre v. Cent. Altagracia*, 217 U.S. 502, 507-08 (1910)). The Board's placement of the burden of proof regarding employee status is completely in line with this principle, and Congress has never intervened to express its disapproval with the placement of the burden. After all, employers make the decisions about how to classify their workers and structure their working relationship. As noted by an ALJ in a decision adopted by the Board with unrelated modifications:

> [N]o cause appears for a departure from such a relegation of proof responsibility. The determination as to independent contractor status requires careful assessment of a myriad of factors, principally consisting of matters emerging from contracts and agreements solemnizing the relationship, statutes bearing thereon, and the particular employer's practice with respect thereto. Quite obviously, employers would be thoroughly conversant with such matters so fundamental to the relationship through which their economic interests are pursued. Thus, no unreasonable burden is imposed by placing the onus on them to affirmatively plead and substantiate such a defense on the basis of record proof.

Cent. Transp., Inc., 247 NLRB 1482, 1486 (1980). As it is not unreasonable to impose the burden on an employer to show that a worker should be excluded from the Act, there is no unreasonable burden in taking the further step of saying that an employer's failure to carry its burden results in an 8(a)(1) violation. Once it is established that misclassification occurred, the GC need not make an additional showing—the misclassification itself inherently interferes with Section 7 rights.[70]

---

[69] See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001) (upholding Board rule that party seeking to exclude persons as supervisors bears the burden of proof); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (party asserting independent contractor status bears burden of proof); *Allstate Insurance Co.*, 332 NLRB 759 (2000) (party asserting supervisory or managerial status bears burden of proof); *AgriGeneral L.P.*, 325 NLRB 972 (1998) (party claiming exemption of agricultural employees bears burden of proof).

[70] Congress intended §8(a)(1) to be interpreted broadly. During the debates leading to passage of the Wagner Act, Senator Wagner himself, commenting on the overlap between §8(a)(1) and the more specific prohibitions of §8(a)(2) through (5), stated the latter were added "without in any way placing limitations upon the broadest reasonable interpretation of its [§8(a)(1)] omnibus guaranty of freedom." Hearings on H.R. 6288 Before the House Committee on

Even if Respondent's mistaken contention were true that the burden is on the GC to prove both employee status and the 8(a)(1) violation, the Board should no doubt uphold the finding that misclassification violates the Act because that burden has clearly been met. As the ALJ remarked, "[a]ssuming for the sake of argument that the proper legal standard placed the burden upon the General Counsel, given the sheer weight of the evidence in this case the same result would follow." (ALJD 11, fn. 5). Thus, the ALJ's conclusion that misclassification violates the Act should stand.[71]

3. The Fact that Employee Status Implicates the Board's Jurisdiction is No Bar to Finding a Violation

The Employer's argument that finding a violation is inappropriate because employee status is a "threshold" issue misunderstands the process by which misclassification occurs. Misclassification is not a natural phenomenon. It arises from an employer's conscious and deliberate choices which have the effect of treating workers as employees while maintaining the pretense that they are independent contractors. These actions constitute the "conduct or omission that might chill protected conduct." This is illustrated by Judge Montemayor's factual findings in the instant case. IBT's drivers were required to sign agreements labeling them "independent contractors," affirming that they were not employees, and purporting to give drivers control over certain aspects of their work. (GC Exh. 7, 9). Yet, at the same time, IBT promulgated extensive work rules that drivers were required to follow, and even instituted a progressive discipline program for its drivers. It is these types of deliberate choices by IBT that led the ALJ to conclude that IBT had misclassified its drivers and violated §8(a)(1).

Labor, 74th Cong., 1st Sess. 13 (1935) reprinted in *2 Legislative History of the National Labor Relations Act 1935* at 2487.

[71] *See e.g. Teamsters Local 107*, 113 NLRB 524, 527 (1955) ("While we find merit in the Respondent Local 107's exception . . . it is clear from the foregoing that this error is immaterial to the result herein.); *W. Foundry Co.*, 105 NLRB 714, 715 (1953) ("As we find the Trial Examiner's primary findings and conclusions to be correct, we deem any possible error in these and other minor findings to be immaterial.").

4. Finding Misclassification to Violate 8(a)(1)Would Not Interfere with Free Speech

Respondent's free speech argument fails for two reasons. First, finding a violation does not run afoul of Section 8(c) because the speech would be inherently coercive and threatening. Second, the facts at hand make clear that a violation is not based on "[m]erely telling workers how the Company seeks to structure its economic relationship." A violation is premised on the Employer's *actions* that result in misclassification.

Assuming for the sake of argument that speech is implicated, the very text of Section 8(c) recognizes that an employer's speech is not protected if it contains "threat of reprisal or force or promise of benefit." 29 USC § 158(c). [72]. Here, the employer's speech chills Section 7 activity and contains an inherent threat: that workers risk termination for protected activity because they are not actually protected. The threats implied by misclassifying take this outside of Section 8(c)'s ambit.[73]

Further, neither free speech nor Section 8(c) is implicated because the violation is based on the employer's *actions*—calling its drivers independent contractors while taking steps to exercise a level of control indicative of employee status. It is these actions—treating workers like employees under the common law test, while unlawfully chilling their exercise of their Section 7 rights by claiming they are independent contractors who have no such rights—that manifest the violation. It is not merely speech. Just as an employer cannot escape liability by couching an unlawful termination as the execution of a mistaken, legal opinion, an employer cannot be allowed to escape liability for the act of misclassifying by couching it as speech and a mere legal opinion.

---

[72] , "An employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Childrens Ctr. for Behavioral Dev.*, 347 NLRB 35 (2006) (emphasis added)

[73] *See Hornick Bldg. Block Co.*, 148 NLRB 1231, 1235 (1964) (Statement was "not a view, argument, or opinion protected by Section 8(c) but, under all circumstances of this case, amounted to a statement of intention by the president of the Company and an implied threat of economic reprisal.). *see also Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 (1962) (Overruling certain decisions because "[t]o adhere to those decisions would be to sanction implied threats couched in the guise of statements of legal position.").

D. Misclassification Violates the Act in the Context of the Employer's Other Unfair Labor Practices

If the Board were to disagree that misclassification itself violates the Act or to determine that it does not have to reach that determination under the facts of this case, then the Board should find that misclassification violates the Act when it exists and continues, as here, in the context of other unfair labor practices. This conclusion is supported by the entire argument above, buttressed by the fact that the peril of misclassification—its interference with Section 7 rights—is amplified once workers engage in protected activity and see an employer violating the Act by committing other unfair labor practices.

It is well settled under Board law that the context surrounding actions or statements by an employer—and the existence of other violations of the Act in particular—can be the deciding factor in determining whether those actions or statements violate the Act. In *Forest Industries*, 164 NLRB 1092, 1094 (1967), the Board adopted an ALJ's finding that the Employer—in the context of other violations—violated Section 8(a)(1) by screening a certain film to its employees. The ALJ stated that he did "not deem it necessary . . . to here determine whether the screening of the film, standing alone, violates the Act." *Id.* In *Bandag*, 225 NLRB 72 (1976), the Board upheld, without discussion, the ALJ's finding that a statement violated Section 8(a)(1), clarifying that "[t]he legality of such a statement depends on the context in which it is uttered. In some instances, it has been regarded as an illegal threat; in other contexts, it has been construed to be merely a description of management's bargaining strategy." *Id.* at 83 In finding a violation, the ALJ relied on the "animus noted above from other statements of the Respondent, as well as other violations of Section 8(a)(1)." *Id* [74]

[74] *See also Yellow Cab*, 229 NLRB at 643 fn. 1 (Member Murphy agreed with the rest of the Board members that the Employer violated Section 8(a)(1), but clarified in a footnote that she found it to be a violation "when considered in the context of other violations of the Act." Otherwise, the statement might have been nothing more than a factual prediction supported by financial records. *Id.); Arakelian Enterprises, Inc.*, 315 NLRB 47, 62 (1994). (Board's analysis of whether interrogation violates the Act examines all the surrounding circumstances as other violations of the Act make it more likely that the interrogation was unlawfully coercive.)

In all of these cases, the context and existence of other violations were part of what made the statements and actions a violation. It is critical to note, however, that none of these cases utilized the existence of other violations to infer motive, as occurs under an 8(a)(3) analysis, and Charging Party is not suggesting the Board adopt some type of motive-based analysis for finding misclassification to be a violation of the Act. A discussion of motive is unnecessary because the very existence of other violations contributes to how an employee perceives certain statements or actions. So, an otherwise innocuous statement can become coercive in certain contexts because employees will be more aware of an Employer's capacity to commit those violations and that knowledge would intensify the chilling aspect of the statement or action. The instant case demonstrates that the same is true with regard to misclassification.

Here, IBT's drivers did not begin to challenge their misclassification and engage in protected concerted activity unencumbered—as soon as they did so, the Employer began interfering with their protected activity. As correctly found by the ALJ, IBT violated the Act by interrogating drivers by polling them to ascertain who supported the Union, expressing futility of the union organizing campaign, threatening drivers with unspecified reprisals and suggesting that they leave the Company, interrogating drivers about their support for the Union, threatening drivers with unspecified reprisals and company closure, and promising an employee better work for abandoning his union. (ALJD 29-30).[75] It is undeniable that seeing IBT commit these violations, any reasonable employees would feel an intensified chilling effect from misclassification because the employees will know that the Employer is capable of violating the Act and will be even more reticent to challenge their misclassification for fear of reprisals.

[75] Further evidence of IBT's animus is found emails where IBT refers to the Union as "motherfuckers" or "plants" or "goons." (see GC Exh. 126-137, U. Exh. 37-38).

E. Misclassification is Violation When Actively Used to Chill Section 7 Activity

If the Board does not agree that misclassification is a violation itself or in the context of other unfair labor practices, or determines that it is unnecessary to make those determinations in the instant case, then the Board should nevertheless find that misclassification violates the Act here, where the Employer has taken steps to actively use misclassification to interfere with the exercise of employees' Section 7 rights. Once drivers began to engage in protected concerted activity and to challenge their misclassification, IBT engaged in an "attempt[] to manufacture a record that would color the facts in its favor." (ALJD 10). These actions are extensively documented above, and are undeniable proof that IBT was on notice that its drivers were actually misclassified—if IBT believed it had properly classified its drivers, there would be no need for it to manufacture such evidence. Even internal IBT emails demonstrate that IBT was attempting to make its drivers look like "true" independent contractors, indicating that IBT knew its drivers were not actual independent contractors. (U. Exh. 127).

Nonetheless, IBT took steps to actively continue that misclassification and to use that misclassification to directly chill protected concerted activity. To start, IBT continued to require drivers to fill out the weekly lease agreement which describes the drivers as "independent contractors" and states that it is not creating an employment relationship between the driver and IBT. (GC Exh. 16 at 2, 3). Then, IBT also issued various memos that directly used the drivers alleged independent contractor status to chill them from continuing to exercise their rights. For example, on May 21, 2015, IBT distributed a memorandum to drivers regarding rate negotiations. (Jt. Exh. 1(a)). This memo specifically stated that it was being sent out because drivers had been engaging in concerted activity by asking for wage increases. The memo then specifically instructs drivers *not* to engage in such protected activity because "under federal law all contractors must

negotiate individually and not as a collective group." *Id.* There can be no clearer example of misclassification actively being used to chill section 7 activity.

Similarly, on June 12, IBT distributed a memo blaming the Teamsters for harassing and intimidating. (GC Exh. 90). This memo also states that the Teamsters do not have any power over IBT—implying that any continued attempts to assert their rights would be futile. *Id.* On July 15, IBT went even further and essentially threatened drivers with termination. (Jt. Exh. 1(d)). In that memo, IBT states that as a result of drivers challenging their misclassification, IBT will be ending its long term leases for trucks and would seek short term leases—for drivers who are dependent on the trucks they obtain from IBT, this threat would clearly chill any continued challenging of their misclassification. But IBT does not leave it there, at the end of the memo it specifically states that it could stop contracting with these drivers (with the implication being that this will not be necessary if drivers stop challenging their misclassification): "IBT has had a long and successful relationship with its drivers, and, for the sake of IBT, our customers, and you and your families, we hope that it will continue." *Id.* There is no way to read this memo other than as a caution to drivers that if they do not stop challenging their misclassification, IBT will have to end its relationship with them. Thus, there is no doubt that in this case IBT took steps to actively continue the misclassification and to actively use the misclassification to interfere with the exercise of Section 7 rights.

F. Any Remedy for Other ULPs Must Include an Order to Reclassify and to Cease and Desist from Misclassifying

Finally, if the Board does not agree that misclassification is a violation of Section 8(a)(1), or determines that it does not need to address the issue here because it will not affect the remedy, then at absolute minimum, the Board should clarify that the remedy for any unfair labor practice involving employees misclassified as independent contractors *must* include an order to cease and desist from misclassifying and an order to classify the misclassified workers as employees.

Regardless of whether misclassification violates the Act, an acceptance of employee status is necessary to properly remedy existing unfair labor practices.

Such a finding by the Board would fit squarely within the Board's broad authority to order such relief as is necessary to remedy a violation. *See United States Postal Serv.*, 211 NLRB 727, 730 (1974) (ALJ, in decision adopted by the Board without discussion, recognizing "that the Board has broad remedial powers under Section 10(c) of the Act to eliminate the effects of violations"). In other contexts, the Board has used this broad authority to order more expansive relief than the violations would typically call for in order to ensure that the violations were fully remedied. In *Peaker Run Coal*, for example, the Board issued a bargaining order even though it did not find a 8(a)(5) violation because that order was necessary to fully remedy the 8(a)(1) and (3) violations. *Peaker Run Coal*, 228 NLRB No. 16 (1977).

This clarification of the proper remedy in cases involving misclassification is necessary because only employees have rights under the Act, and Board remedies typically apply only to employees. Therefore, once an ALJ or the Board finds that unfair labor practices were committed against any employee who is misclassified as an independent contractor, the Board should order the employer to affirm the status of those employees. The problem with failing to include this in the Board order can be seen in the *Pacific 9 Transportation* advice memorandum. In that case, the employer agreed to a settlement after the Region determined that it had misclassified its employees and committed unfair labor practices. The Employer agreed to post a "Notice to Employees" as a remedy. After doing so, however, the Employer told its misclassified drivers that they were not employees—despite the Region's determination—and that the notice posting did not apply to them. *Pacific 9 Transportation*, Case 21-CA-150875, Advice Memorandum dated December 18, 2015.

This utter disregard for the Board's order becomes a possibility in any case involving misclassified employees. If not forced to acknowledge and remedy its misclassification, any

employer could claim that any remedy ordered by the Board is not applicable to the very misclassified workers against whom the violations were actually committed. The best way to prevent that is to include cease and desist and reclassify language in any case finding a violation against employees who are misclassified. A recent ALJ decision in *SOS International* demonstrates this approach. Judge Rosas found that the Employer misclassified its interpreters and committed numerous unfair labor practices. Although he did not find that misclassification is an independent violation of the Act, Judge Rosas did order the Employer to

> Take whatever steps are necessary to reclassify its interpreters that work at the EOIR locations nationwide, pursuant to the EOIR contract with SOSi, and treat them as employees rather than independent contractors, including rescinding any portions of the Independent Contractor Agreements and other documentation Respondent requires them to complete that purports to classify them as independent contractors.

Sos Int'l, LLC, 21-CA-178096, 2018 WL 1292639 (Mar. 12, 2018). While the Judge does not discuss this portion of his order, the logical inference is that the Judge realized that none of the other remedial orders would have any practical effect without making it clear that the interpreters were misclassified *for purposes of the Act*.

IV. Conclusion

For the foregoing reasons, it is clear that Respondent's exceptions misstate the facts and its arguments fail under the weight of record evidence. Judge Montemayor correctly considered the entirety of the record, made credibility determinations as necessary based on his observations, and correctly applied Board law to the facts. Charging Party therefore respectfully urges the Board to affirm the ALJ's findings that IBT violated the Act as stated above and as described in Charging Party's separate cross-exceptions filed on March 16, 2018.

DATED: April 27, 2017

Respectfully submitted,

JULIE GUTMAN DICKINSON
HECTOR DE HARO

BUSH GOTTLIEB, A Law Corporation
Attorneys for International Brotherhood of Teamsters, Port Division

By: _____
JULIE GUTMAN DICKINSON

By: _____
HECTOR DE HARO

CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was submitted by e-filing to the Executive Secretary of the National Labor Relations Board on April 27, 2018.

A copy of the **CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** was also served upon the following by electronic mail on April 27, 2018.

A. Jack Finklea, Esq.
Scopelitis, Garvin, Light, Hanson & Feary, PC
jfinklea@scopelitis.com

Donald J. Vogel, Esq.
Scopelitis, Garvin, Light, Hanson & Feary, PC
dvogel@scopelitis.com

Ami Silverman
ami.silverman@nlrb.gov

Sanam Yasseri
Sanam.yasseri@nlrb.gov

Hector De Haro, Esq.